2346 ✓

Dec 12.

Submitted upon the rule

Dismissed no jurisdiction below

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 463.

THE COUNTY OF ST. CLAIR, PLAINTIFF IN ERROR,

vs.

JOHN B. LOVINGSTON AND THE WIGGINS FERRY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED AUGUST 8, 1873.

Accretion

Oct. 7. 1873.

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	1
Bond	5	2
Declaration	8	3
Defendants' plea	11	5
Verdict	12	5
Judgment	13	6
Bill of exceptions	13	6
Map	14	6
Map	18	8
Map	19	8
Two maps	32	15
Two maps	39	18
Map	42	21
Map	49	24
Judgment of supreme court	69	33
Clerk's certificate	70	34
Certificate of chief justice supreme court Illinois	71	34
Allowance of writ of error	73	34
Opinion	74	35
Affidavit of value	84	40
Assignment of errors	85	40

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the justices of the supreme court of the State of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John B. Lovingston and The Wiggins Ferry Company, appellants, and the county of St. Clair, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such

2 their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said county of St. Clair, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Nathan Clifford, Senior Associate Justice of the said Supreme Court, the sixteenth day of July, in the year of our Lord one thousand eight hundred and seventy-three.

Issued 16th July, 1873.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

3 The United States of America to John B. Lovingston and The Wiggins Ferry Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Illinois, wherein the county of St. Clair is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable David Davis, associate justice of the Supreme

Court of the United States, this sixteenth day of July, in the year of our Lord one thousand eight hundred and seventy-three.

DAVID DAVIS,
Asso. Justice of the Supreme Court of the United States.

4 On this second day of August, in the year of our Lord one thousand eight hundred and seventy-three, personally appeared Gustavus A. Koerner before me, the subscriber, Charles Becker, clerk of the circuit court within and for the county of St. Clair, State of Illinois, and makes oath that he delivered a true copy of the within citation to the within-named John B. Lovingstone, July 29th, 1873, and a true copy thereof to Napoleon Mulliken, president of the within-named Wiggins Ferry Company, on the 2d day of August, A. D. 1873.

G. A. KOERNER.

Sworn to and subscribed the 2d day of August, A. D. 1873.
[SEAL.] CHARLES BECKER, *Clerk.*

5 STATE OF ILLINOIS,
St. Clair County, ss:

Know all men by these presents that we, the county of St. Clair as principal, and Charles L. Emmerich and Joseph Veile as security, are held and firmly bound unto John B. Lovingston and The Wiggins Ferry Company in the penal sum of five hundred dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. In testimony whereof the county of St. Clair has caused these presents to be signed by the presiding judge of the county court of St. Clair County, Illinois, and to be attested by the clerk of said court, and the seal of said county to be hereunto affixed, and the said Charles L. Emmerich and Joseph Veile have hereunto set their hands and seals this seventh day of July, 1873.

The condition of the above obligation is such that whereas an appeal had been taken by the said Wiggins Ferry Company and John B. Lovingston from a judgment of the circuit court of St. Clair County,
6 Illinois, to the supreme court of the State of Illinois, the same being the highest court of the State of Illinois, and a court of the last resort, which said judgment had been rendered in an action of ejectment in favor of said county of St. Clair, and against the said Lovingston and Wiggins Ferry Company; and whereas at the June term of said supreme court, A. D. 1872, in the southern grand division at Mount Vernon, Illinois, the said supreme court reversed said judgment of the circuit court of St. Clair County, and rendered judgment for costs against the said county of St. Clair; and it appearing from the record, as well as from the certificate of the chief justice of the said supreme court of Illinois, that in deciding the said cause there was drawn in question the validity of a law of Congress, and that the decision of said supreme court was against the validity of said law, and whereas the said county of St. Clair has applied for a writ of error from the Supreme Court of the United States to the said supreme court of Illinois, and which writ has been allowed by the honorable David Davis, one of the associate justices of the Supreme Court of the United States, and whereas a citation is about to be issued in the above case:

7 Now, if the said county of St. Clair and Charles L. Emmerich and Joseph Veile shall duly prosecute said writ of error, and shall pay all costs and damages which, upon the affirmance of said judgment

of said supreme court of Illinois by the Supreme Court of the United States, may be adjudged to the respondent in error, then the above obligation to be null and void; otherwise to remain in full force and virtue.

(S'g'd) THE COUNTY OF ST. CLAIR,
{SEAL OF COUNTY COURT.} By T. H. PIEPER, [SEAL.]
Presiding Judge of the County Court of said County.
(S'g'd) C. L. EMMERICH. [SEAL.]
(") JO'S VEILE. [SEAL.]

I, Sebastian Fietsam, clerk of the county court of St. Clair County, Illinois, do hereby certify that Hon. Frederick H. Pieper at the time of signing this bond was the presiding judge of the county court of St. Clair County, Illinois, duly elected and qualified, and that the seal of the county annexed to said bond is the official seal of said county, in my custody, and was set there by order of the county court.

Witness my hand and official seal this 7th day of July, 1873.

{SEAL OF COUNTY COURT.} (S'g'd) SEBASTIAN FIETSAM,
County Clerk.

Approved by me.
(S'g'd) DAVID DAVIS,
Asso. Judge of Sup. Court.

8 STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the circuit court within and for the county of St. Clair, and State of Illinois, begun and held at the court-house, in the city of Belleville, on Monday, the 23rd day of October, A. D. 1871, it being the fourth Monday of October, A. D. 1871, according to the act of the general assembly, by the Hon. Joseph Gillespie, judge of the twenty-fourth judicial circuit of the State of Illinois, of which the said county of St. Clair forms a part, the following proceedings were had, to wit:

Be it remembered that on the 26th day of August, A. D. 1870, the following declaration was filed, to wit:

To the October term of the St. Clair County circuit court, A. D. 1870

STATE OF ILLINOIS,
St. Clair County:

The county of St. Clair, (it being the county of St. Clair, State of Illinois,) plaintiff in this suit, complains by its attorneys of John B. Livingston and The Wiggins Ferry Company, a corporation chartered by act of the legislature of the State of Illinois, defendants; for that whereas the county of St. Clair, on the first day of August, A. D. 1870, at the county aforesaid, was possessed of certain premises situated in said county of St. Clair, and described as follows: a tract of land, bounded on the north by the southern line of the first ferry division of the city of East St. Louis, as laid out in the plat of the first ferry division, recorded in the books of record of said county of St. Clair,
9 on the east by the west line of survey No. 579, on the west by the low-water mark of the Mississippi River, and on the south by the south line of said survey No. 579, extended to low water-mark of the Mississippi River; which said premises the said county of St. Clair claims in fee; and said county being so possessed thereof, the said

defendants, Lovingston and The Wiggins Ferry Company, on the 2nd day of August, A. D. 1870, at the county aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and unjustly with'old from the said plaintiff the possession thereof.

And whereas also the said plaintiff, on the first day of August, A. D. 1870, at the county aforesaid, was possessed of the undivided three-fourth parts of certain premises situated in said county of St. Clair and described as follows: a tract of lands, bounded on the north by the southern line of the first ferry division of the city of East St. Louis, as laid out on the plat of the first ferry division, recorded in the books of records of said county of St. Clair, on the east by the west line of survey No. 579, on the west by the low-water mark of the Mississippi River, and on the south by the south line of said survey No. 579, extended to low-water mark of the Mississippi River; which said premises the said plaintiff claims in fee; and the said plaintiff being so possessed thereof, said defendants afterwards, to wit, on the 2nd day of August, A. D. 1870, at the county aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and unjustly with'old from the said plaintiff the possession thereof.

And whereas also the said plaintiff, on the first day of August, A. D. 1870, at the county aforesaid, was possessed of certain premises situated in the county of St. Clair and described as follows: a tract of land, bounded on the north by the southern line of the first ferry division of the city of East St. Louis as laid out in the plat of the first ferry
10 division, recorded in the books of record of said county of St. Clair, on the east by the west line of survey No. 579, on the west by the low-water mark of the Mississippi River, and on the south by the south line of said survey No. 579, extended to low-water mark of the Mississippi River; of which said premises the said plaintiff claims the perpetual possession; and the said plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the 2nd day of August, A. D. 1870, at the county aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and unjustly with'old from said plaintiff the possession thereof.

And whereas also the said plaintiff, on the first day of August, A. D. 1870, at the county aforesaid, was possessed of the undivided three-fourth parts of certain premises situated in said county of St. Clair and described as follows: a tract of land bounded on the north by the southern line of the first ferry division of the city of East St. Louis, as laid out in the plat of the first ferry division, recorded in the books of record of said county of St. Clair, on the east by the west line of survey No. 579, on the west by the low-water mark of the Mississippi River, and on the south by the south line of said survey No. 579, extended to low-water mark of the Mississippi River; of which said premises the said plaintiff claims the perpetual possession in said three-fourth parts; and the said plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the 2nd day of August, A. D. 1870, at the county aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and unjustly with'old from said plaintiff the possession thereof. To the damage of the said plaintiff of $500; and therefore it brings this suit.

G. & G. A. KOERNER & LOUIS HOUCK,
Attornies for Plaintiff.

11 Be it remembered, that on the 24th day of October, A. D. 1870, the following plea was filed, to wit:

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON ET AL. } In ejectment.

And the defendant comes and defends the wrong and injury, when, etc., and says that it is not guilty of unlawfully withholding the said premises claimed by the plaintiff, in manner and form as alleged in said declaration, and of this it puts itself upon the country, etc.

By L. V. BOGY, UNDERWOOD & NOSTLING,
Its Attorneys.

Be it remembered that at the October term, A. D. 1870, the following proceedings were had, to wit:

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON & AL. } Ejectment.

On the fifth Monday of the term it is ordered by the court that this cause be continued.

Be it remembered that at the March term, A. D. 1871, the following proceedings were had, to wit:

12 THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON ET AL. } Ejectment.

On the fourth Monday of the term the court orders that this cause be continued.

Be it remembered that at the October term, A. D. 1871, the following proceedings were had, to wit:

THE COUNTY OF ST. CLAIR, STATE OF Illinois,
vs.
JOHN B. LOVINGSTON AND THE WIGgins Ferry Company. } Ejectment.

On the second Wednesday of the term the defendant, The Wiggins Ferry Company, moves the court for a change of venue of this cause, and files its affidavit in support thereof, which motion is by the court denied.

And thereupon, issue being joined, the court orders that a jury be called, and twelve good and lawful men, to wit, &c., are chosen and sworn according to law, and after hearing the evidence and arguments of counsel, the jury, on the second Friday of the term, November 3d, 1871, return into court with the following verdict, to wit:

We, the jury, find the defendants guilty of unlawfully withholding the premises in the plaintiff's declaration described, and that the plaintiff is entitled to an estate in fee-simple in the following-described promises, to wit: A tract of land bounded on the north by the
13 southern line of the first ferry division of the city of East St. Louis, as laid out on the plat of the first ferry division, recorded

in the books of record of said county of St. Clair; on the east by the west line of survey No. 579; on the west by the low-water mark of the Mississippi River; and on the south by the south line of said survey No. 579, extended to low-water mark of the Mississippi River, in the county of St. Clair & State of Illinois.

Whereupon the defendant moves the court for a new trial, which motion is by the court overruled pro forma. It is therefore considered and adjudged by the court that the plaintiff recover of and from the said defendants the above-described premises, and that it have a writ of possession therefor, and also an execution of its proper costs herein to be taxed.

Whereupon the defendant (Wiggins Ferry Company) prays an appeal to the supreme court, which is allowed upon giving bond in the penal sum of $500.00, conditioned according to law, with security to be approved by the clerk of this court by consent of parties, said bond and the bill of exceptions to be filed within thirty days. And now, on the third Wednesday of the term, Vital Jarrot is accepted as security on said bond, and the same is by the court approved.

Be it remembered that on the 13th day of November, A. D. 1871, the following bill of exceptions was filed, to wit:

In circuit court, October term, A. D. 1871.

STATE OF ILLINOIS,
County of St. Clair, ss:

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON AND THE WIGGINS FERRY COMPANY. } Ejectment.

14 Be it remembered that, on the trial of this cause before the jury, the following was the evidence for the plaintiff:

EDWARD RUTZ, being duly sworn, testified as follows:

I know this tract of land, bounded on the north by the southern line of the first ferry division; on the east by the western line of survey 579; on the west by the low-water mark of the Mississippi River; on the south

(Annexed map is here shown witness.)

(Here follows map, marked page 14.)

15 I have seen this plat before; that is the tract of land where the name of John B. Lovingston is written. I think that Mr. Lovingston told me in August, 1870, that he had leased it from the Wiggins Ferry Company. I could not tell whether he had used it in any way; I do not know. He claimed to have leased it from the Wiggins Ferry Company. At present I am treasurer and assessor of the county. I am satisfied that it is the tract of land described in the declaration. It is what we call washed-on land. It is a sand-bar now. I come here to this State in 1848. But I was gone about 10 years. I have been surveyor, and am now assessor four years. This tract was not in its present 4 years ago, when I first saw it. These lands change

every year, more or less. I guess it has rather increased during the four years. I have never seen it overflowed; I was never down there when they had any high water. I don't recollect of any vegetation on it when I first knew it. I used to be county surveyor of this county about two years; that was before I was treasurer and assessor. There is no doubt about the identity of the tract.

Cross-examination:

In reference to the island, they call the whole river-front the island. A very small portion of this tract is east of the present Cahokia Creek. It is not a strip; it is a corner. The island is all gone. I suppose this is the island. The tract is opposite this survey, 579, between that and the river—this square piece. I cannot tell you how far the island runs down now. It might run to New Orleans. This (pointing to tract within the yellow lines) has added on to this island. This is marked down as the Cahokia Creek. This is all one peice now all down to the Cahokia Creek. It is difficult to state whether all west of Cahokia Creek is now the island as it exists. The old Bloody Island, I
16 think, was way above. They call it now "the island." The top of this island is now washed away. It is mostly all gone, and the lower part has been added to. The Cahokia Creek is the only water that separates this from the Mississippi River. This here (pointing to Lovingston tract) is the part they sue for. It is west of survey 579, all from there west to the river. I suppose that has been formed by the washings of the river.

Redirect examination:

As far as I know, the head of the old island has been washed away. I know only from the maps. The island, according to this map, ended here originally. I think there are about 40 acres of it left now. I don't know how many acres there are embraced by these yellow lines. I wouldn't call this, embraced by these yellow lines, "Bloody Island." Bloody Island is up here, (pointing towards the main dyke.)

Recross examination:

Q. Has not that all been called Bloody Island ever since you have known it?

(Objected to; objection overruled.)

A. All I know about it they call this strip—you might call it accretion—they call it now "the island." Whether it is "Bloody Island" or any other island, I don't know. They call it "the island" down there. At present there is no island. When I first came to this place I recollect an island called Bloody Island, which was separated from the main shore.

Redirect examination:

Some of this land is south of the creek, as the creek now runs. Here is a little. This part is not opposite survey 579. I expect what Lovingston is in possession of extends clear back to the creek. I believe he was not in possession of any east of the creek.

17 GUSTAVUS HILGARD, being duly sworn, testifies as follows:

I now hold the office of county surveyor. (A map is here shown witness.) I made this map by order of the county court of St. Clair County. I have surveyed it as the county surveyor; this is a correct map of the localities in the neighborhood of Bloody Island. (Witness is here shown

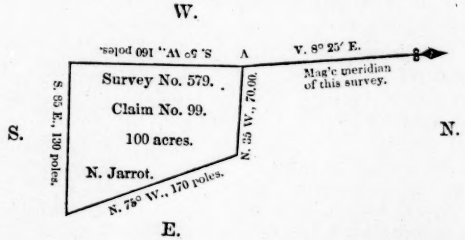
the map that was shown to preceding witness.) I have examined this map. It is all about the same thing, only the shape of Bloody Island is a little different. This tract is west of survey 579. It is right north of Cahokia Creek; it takes in a portion. The tract that Lovingston is on continues in a straight line with the survey and then runs down to the river. It takes in the whole of 579. The declaration describes the tract properly. The southern line, the ferry division, is the south line of 624; it makes the north line of survey 579. There is a dispute about these lands, but that don't cut any figure in the case. That is between the ferry company and the "Cahokia Commons." The line of the first ferry division is extended to run to the southern line of survey 624, which make it the northern line of survey 579. (The map first shown witness is again shown to him.) I have known this Mississippi River there since I was a little boy. I have run out the lines according to the field-notes of the U. S. surveys. I have got the directions, courses, and distances correct, according to the U. S. field-notes, except the accretions. I surveyed the accretions; the others are all according to the U. S. field-notes. What is yellow-colored on this map was not surveyed by the U. S.; I made the survey myself. Bloody Island has been surveyed by the U. S. According to these surveys and the map, Bloody Island, when it was surveyed in 1824, was about ¾ of a mile north of the tract in question. Speaking of survey 579, which was on the old bank of the river, there was a line run by the U. S. It was according to the
18 field-notes that all the lines were run. This is a correct map. The plat and field-notes in the U. S. office correspond with my notes—just a copy of the field-notes of survey 579. The Mississippi River is not given as a boundary on the plat.

Plaintiff's counsel offers the plat and field-notes above testified to in evidence.

(Copy of plat and field-notes.)

(Here follows map, marked page 18.)

19 *Survey No. 579.—Claim No. 99.*



Surveyed for Nicholas Jarrot, who claims in right of Jean Dunwehelle 100 acres of land, beginning on the bank of the Mississippi River, opposite St. Louis, from which the lower window of the U. S. storehouse in St. Louis bears N. 70¾ W.; thence S. 5 W. 160 poles to a point in the river from which a sycamore 20 in. dia. bears S. 85 E. 250 links; thence S. 85 E. 130 poles (at 30 poles a slash) to a point; thence N. 15 W. 170 poles to a forked elm on the bank of Cahokia Creek; thence N. 85 W. 70 poles to the beginning.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, Febr. 17th, 1869.

This is to certify that the foregoing plat and description of survey No. 569, claim No. 99, is correctly copied from page 91 of book No. 2, marked "private surveys in Illinois," which book is up to this day preserved in this office.

FRED'K MOSBERGER,
U. S. Recorder.
By E. H. HESS, *Dep'ty.*

[U. S. rev'ue, $0.05.]

20 This land in question is made land. I think I was swimming there in 1854. It was covered with water as late as 1854.

Q. In your opinion, how was it made—what caused it?

(Objected to; objection overruled.)

A. That tract of land was formed by the construction of the so-called coal-dyke—the Pittsburg coal-dyke. The upper dyke also had some tendency to fill that up. If the upper dyke and other improvements above had not been made it would not have increased so largely as it has. It was owing to the operation of both these dykes; but, according to my recollection, it was formed from the construction of that coal-dyke. The dyke that was made by the city of St. Louis in 1852 is where they travel over now with teams. That caused the formation of all the accretions there on the island. Bloody Island, when it was surveyed in 1824, was about a quarter of a mile above the present dyke, north. The southern point of Bloody Island was, in '24, about three-quarters of a mile from the tract now in question. This is my certificate, (referring to the certificate on the map.)

Between the island, as they call it, and survey 579, there is some low land, and then the present bed of the Cahokia Creek runs through it. In time of very low water you may cross from survey 579 to the Lovingston tract on foot. There is always a slough and running water. In high water you can't cross, except in boats. When the river is in an ordinary stage it is not passable on foot. It is made land, and was covered with water as late as '54—the entire tract that is now sued for. When the river is very high I think it would overflow now. The riveting or paving the bank with stones by the Wiggins Ferry Company had the effect of retaining the land that was made after it was made. It

21 does not protect it from overflowing, except it is made higher than the surrounding land. The riveting don't keep the current of the river out in time of high water, when the river raises. In ordinary stages it protects the land; it keeps it from washing away. I am not prepared to say positively, but I presume that the land lying to the west of the Cahokia Creek is lower than the top of the bank lying to the east of it; cannot say positively, because I never had a level there. In some places there is a clear and well-defined bank east of the Cahokia Creek. In the building of the R. R.'s and things they have dug up the old bank near the round-house. I suppose you can distinguish the old bank of the river before the dyke was built. It is just as I tell you; right near the round-house and the Belleville R. R. you cannot well define the bank, but a little further above and below you can define *you can define* the bank.

Cross-examination:

This land all lies west of survey 579. One of the cause' of this formation is the building of the Pittsburg R. R. dyke. Another cause is the

dyke constructed by the Wiggins Ferry Company above. I don't think the putting of rock between the island and West St. Louis by the Wiggins Ferry Co. helped to form the land there. If they had not put rocks there it would not have washed the whole island off, as long as they kept up the dykes. The dyke was protected by the rocks. The dyke went to the bank of the river. I know that the Wiggins Ferry Company have graded down to the river on the west side and spent large sums of money. It protects the land that is there. This land sued for lies south of what was originally the old Bloody Island, and west of this claim 579.

What is called the Condaire claim or survey 786 includes these three surveys, 579, 624, and 776. It includes them and also includes
22 the fractions on the east of those surveys up to the creek. The number of the Condaire survey is 786. These are the field-notes of that claim as far as I could see. This survey makes the river the boundary, but at the same time it commences at the corners of the former surveys. It commences at survey 766 and then runs along, including them fractions to the southwest, and includes the entire tract below survey 579, and then says, passing N. Jarrot's corner so many rods, leaving the other parts undisturbed. It leaves the lines of the other surveys undisturbed. It says, "along the river," but at the same time it makes this corner which the old survey makes in the river. (Witness is here shown a paper.) This is a plat of that land. These three surveys were surveyed before by the Government giving the corners, distances, etc., and witness-trees. There was some tracts left between them surveys and the creek. Somebody went and got another survey, including them three surveys, and taking in them fractions, and at the same time running below this survey and taking in another part, stating in the field-notes at so many rods, passing this corner. So it strikes this corner and wherever the other corner was made. (The defendant's counsel reads the field-notes of the Condaire survey to witness.) That is right, and it runs up to the corner of this survey. I have surveyed the western line of the Condaire tract. That is the boundary on the river—the west line of that claim. I have not run the east line on the creek. The west line is the river bank, or what used to be the river front when they were surveyed. This land is all west of the Cordaire tract.

Redirect examination:

The Cordaire tract covers the three other surveys. The line of the Cordair' tract is to be the same as the line of 579, because those other lines were run first, and the notes of the Condaire claim made the same corners.

23 Recross-examination:

We couldn't tell exactly whether the river was there or not, because in one of the notes it says "to a point in the river." We could only run by distances in those surveys where we could not find any witness-trees. As the river is changed, we couldn't tell whether that line was exactly on the river or not. The language "up the river and binding therewith" is very plain, and if the same language had been used in the other lines there would have been no doubt. But we are governed by the first notes. I don't follow the river at all. We have to go by the distances and courses.

(Plaintiff's counsel introduced Hilgard's certificate on plat, which he marks "1," and is copied above. Objected to. The court allows it to go in, and says the point can be reached by an instruction.)

JONATHAN MOORE, being duly sworn, testified as follows:

I have known the territory opposite the city of St. Louis beyond the Cahokia Creek, where the Mississippi River used to flow, and what was called Bloody Island since 1813. I made a survey of that island or part of it in 1852. I have reference to all this land that is marked light yellow. (A map is here shown witness.) I run down a piece on section two. We didn't cross-over the section-line of section two, and we went into section 14. That is not put down here, I believe. My survey embraced part of section two; then up here to section 11, and down through section 14. When I first knew Bloody Island it didn't run below the line of the upper ferry landing. In 1819 and '20 we run straight
24 across from opposite of where the Missouri Hotel used to be; but after a time we had to round the point of the island. I first knew Bloody Island about 1814. I think that is about the first I ever noticed much about it. There was a duel fought there then. There was a very few houses in Illinois town then. I recollect the old brick house—the Pensonean House; a bridge across Cahokia Creek just below that. The Penticost House was across the creek. That old brick house at that time must have been near three-quarters of a mile from the ferry-landing; may be more. It was fully that, I should think. In the year 1814 we could run straight across from the ferry above Day's ferry to the street that the Missouri Hotel was on, below the island. I think the Missouri Hotel was on Oak street. From that they could run straight across. We run straight across from Morgan street to the landing, and didn't touch the foot of Bloody Island at all. In time, years afterward, they begun to round a little point, and there was a bar formed on the Missouri side, and there was a narrow pass there. The bar was forming on the Missouri side and running up, meeting the bar from that island.

I recollect of the U. S. boats working in the river above the island; but I don't know what they were doing, only from what I heard. I heard they were putting obstructions to keep the river from turning—to keep it towards the St. Louis shore.

I recollect when this dyke was built by the city of St. Louis. I don't know exactly what year. I think there was something doing at it when I was there surveying; but I don't know. There was not much of it; it was not across. I was appointed by the governor of the State to survey the swamp and overflowed lands in the county of St. Clair, and with them instructions I went and surveyed that island. I was instructed to take none but Government land, and obtained a copy of all the entries, so as to select the public land. I went through the
25 county selecting that land. I returned it as swamp-land to the auditor of the State. Surveyed it in '52. I included in my survey the land that was south. We went down to section 14 and up into 13. Section 14 is below section 12. (Witness points out sections 11, 12, 13, and 14 on the map.) We didn't go clear through the whole section—about half across it. I returned that land to the governor as swamp-land. I don't know that that land had ever been offered in market by the Government. There was a very small slough between Bloody Island and the main shore. I had a little plat of it in 1808. The island was a very small place when I first knew it. A small part of the river run on this side, and a large part of the river run on the other side—the west side. As time went on it gained on this side and lost on the other. Before that dyke was made there was a good deal of the river on this side. I am not posted in regard to what caused this land south of the island. I know we heard a great deal about the work that was done by St. Louis to prevent the river coming across to our bluffs. I cannot say

whether the dyke made in '48 and the Pittsburg dyke made this land or not; I should think it was making without them. The river, from the mouth of the Missouri, struck across and struck the Illinois shore, and that is what caused the washing away from the river on this side. It has formed a good deal faster since the dyke was made. Before the dyke was made the river was coming on this side of the island, and would, I suppose, but for the labor that was done to prevent it. The current being on this side, the land could not have formed at all.

Cross-examination:

It was a very small island when I first knew it in 1814, so I never anything about Thompson's survey in 1818. I don't know that it was surveyed by the Government before the State. I went to the land-office to ascertain when I was surveying the swamp-land,
26 and I could not ascertain. I didn't lay off all the Bloody Island as swamp-land. I didn't encroach upon the entry that Wiggins had there. When I surveyed it the larger portion of Wiggins' entry had washed off. The additions were mostly right east from there.

Q. To prevent the whole from washing away, has not the Wiggins been to a great deal of expense putting rocks there?

(Objected to.)

I don't know that Wiggins spent anything. I know that the citizens of St. Louis worked there filling in rock. I understood it was the city of St. Louis that was doing the work, and the U. S. some of it. I don't know that that *that* is so. I know that there was rock put into nearly the levee there; but I don't know who done it. I can only tell you what I understood. I wasn't there to know. I understood the rock was put there by the city of St. Louis with the view of cutting a sand-bar. I mean along the west side of the river they threw rocks. I understood it was with a view of keeping a bar from forming down nearly the south part of St. Louis. It was forming a bar there, running up and meeting the island. I don't know anything about it; but I understood that. The Wiggins Ferry Co. may have put in rock there and they may not. I don't know.

I never surveyed the Condaire tract. I don't know that I am prepared to answer what the words "up the river and binding therewith" mean. If I was to see the notes I would understand. I would run to the corner of the Nicholas Jarrot survey. We follow the notes when we survey. It goes according to the notes from one point to another. Where I find a line running to the middle of a certain creek, and running such and such courses, pointing them out to the center of the creek, then
27 we understand the center of the creek to be the line; but where the line runs from one corner of the survey to another we run from one point to the other. I couldn't say whether these lines are run along the river in order to ascertain the quantity only or not. If we get the quantity where a river is made a line we have to meander the river, and it is done often; but if the line is straight we run from one point of the river to another.

A. G. MOORE, being duly sworn, testified as follows:

My profession has been that of surveying. I, in company with Mr. Holbrook and Jonathan Moore, surveyed Bloody Island, or what was termed Island No. 3. I made a correct plat of our work and the notes. I have got the field-notes of our work, all of it, and the notes of original survey of Island No. 3, and the connection of it also, (produces the plat.) The county court sent me down there to make the survey. The sheriff took me. The object was to assist Jonathan More, the swamp surveyor,

in surveying swamp-lands and ascertaining about Island No. 3. That *that* we surveyed in 1852 was the island with a portion of Island No. 3 left. There was but a few acres of Island No. 3 in '52, but a very small portion, I suppose 15 or twenty acres. This line here (pointing to his plat) is the original east bank of the Mississippi, in 1808, as surveyed by John Messenger, senior. In 1818 the river had fell in that much, (pointing.) Thompson intersected the river that much sooner than the survey of Messenger in 1808. In about ten years the river had come to Illinois that much. The line between sections one and twelve was the base that Censtine, or the Government surveyor, made to survey the Island No. 3. He commenced on the range-line and run a line here.

28 He run a mile here and set a corner, corner to section one, two, eleven, and twelve, as he numbered them. He intersected the bank of the river there that much sooner. He next reports 26 chains and some links from this corner. He next took the east shore of Island No. 3, near timber. He next continues the course eight chains west, and establishes a corner. That is that corner—the western corner —and there he notes two cottonwoods, two inches in diameter each, and then he returns back to this corner, and commences to meander Island No. 3 as he surveyed it, and this is the western boundary of it as he surveyed it. He made 128 acres in section 11, and three acres and something in section two, on the island. That contained Island No. 3. Now we made this survey from this point. The island never reached south of the section-line between 11 and 14. We commenced here, run in here, intersected the river there. We run to this point here and intersected the island. We took all the land we could, because I went over two feet into the quicksand. From this point noted a mound, but of course we took no distances. It was all water. Then we continued around here, and this was all water, and we went up here. There is the southern point of Island No. 3. I have it from hearsay that Thompson was the Government surveyor. A lot of land in 2 that belonged to this original survey is gone—washed away. It has gone down towards New Orleans, I suppose. I don't hardly suppose the part of the Island No. 3 that was left would have reached 20 acres. All outside of our survey, to the eastern bank of the Mississippi River, was water in '52. We reached the island in a skiff by employing a man to take us across. There was no dyke there as I know of then. Mr. Gibson was our flagman and our skiff-man. When we were on the island some of the company of us noticed some men working, I don't know how far up north. We could see them move. We asked the question what they were doing.

29 (Objected to.)

They were working up there. I didn't go up to see what they were doing.

(Witness is here shown map marked No. 3.)

I suppose this is the same line that I have platted here. All below that piece, where I went into the quicksand in '52, was water to the eastern bank of the river, and in fact all east of our survey. Most of it, or the whole of it, was water that we had to cross at that time. I don't know whether this land that is now in controversy was under water or not. I cannot tell whether this land, opposite to this survey that has been formed, was water, or what it was. Mr. Hilgard made the survey. Between the survey that we made and the eastern bank of the Mississippi River was water. We had to cross in a skiff to our work. Those bars that have formed in front of the eastern shore have all been formed since I was there, I suppose, if there is any formed there at all. I have

never been down there since. It is 19 years now. I crossed the river once since. It was the dykes or the rocks that was sunk there, the filling up of the channel, that caused the making of this land there. The channel, I recollect very well, was all on this side of the island, or very near it. The whole of the ice come down there. I saw it once myself. It was nearly the same as eddy water between the island and East St. Louis. It had washed the main channel here. It wasn't in the original surveys. In 1808 the river was 73 chains wide, according to Messenger, 73 chains wide on the town line, between Madison and St. Clair. Six miles below, it was 71 chains, so reported by John Messenger, senior. I mean the whole Mississippi River. There was two chains difference in the width of the river in six miles. Messenger was township surveyor.

30 He run the town-line in from the town corner till he intersected the Mississippi River; thence he turned his course and meandered the river down six miles to the other town-line, and then run that line in, and he gives the width of the river at both points. One is 73 and the other 71 chains. It is some less than a mile. Where we crossed it was 11 chains and 20 links between Bloody Island and the main shore. The original Island No. 3 did not quite reach the southern line of section 11 originally. That plat shows what was done. It states every word that was done exactly, and indicates the lines in 1852; is the lines that we run, and the line that was run by Messenger is set down. Messenger was not county surveyor at that time. He was Government surveyor. He was county surveyor here for several years. There was a John M. Messenger, his son, but it was John Messenger, senior. I cannot tell whether he was ever in the employment of the Government except as a subordinate. I understood this: that John Messenger was employed by the Government to run the township off, with the understanding that he was to have the sectional work, because it is not considered that there is much money in running the townships, and W'm Rector got the contract, and Messenger was a little huffy about it, and didn't work as a subordinate much if any. That is my understanding about it. I don't know whether it was so or not. It was common talk.

Cross-examination:

Of the original island, I make in section 11, $128\frac{80}{100}$ acres. I see that there is some calculation that makes $128\frac{86}{100}$. There is only so much difference in our calculations; and in section two $3\frac{27}{100}$ acres, which would make a little over 130 acres in the original survey. There was about 130 acres as run by the Government of the U. S. The plat

31 shows how the lines were run. Messenger meandered along the river in 1808. He didn't survey Island No. 3. Thompson, it is said, surveyed Island No. 3. (Witness here reads aloud the field-notes of the Government survey of Island No. 3, as given before in his testimony.) We were never called on to make the calculation of how much of the island, as it was then survey', was left in '52. I should set it down between 15 and twenty acres. The west part of the island had washed away, and the north part too. All west of that line, (pointing.) Down here there were additions formed. In surveying the island, we surveyed just as near the water as we could. We took our courses, and run direct from point to point. There might have been a few feet sometimes that we left; the river on our left, that is the manner in which surveys are made—and the island on our right. And there might have been a few feet sometimes that the line wouldn't touch the water. We don't make surveys just exactly to the creek; we run direct from point to point. All was water east of that island in '52, to the east

shore of the river, and all below was water. We took in all we could get. I cannot tell how Mr. Hilgard has located that survey. I have a map, but I misplaced it, and didn't bring it with me. The main channel of the river was on the west side of the island originally; about the time I made this survey, the main channel was on this side. The bank on the east side had washed away largely—considerably. I don't know how much. It could be very easily ascertained by calculation. When this dyke was constructed across to the island, it filled up of course, but it changed the current on to the west side of the island, and it begun to wash it out between that and St. Louis, and the other began to fill up. I have never been on the island in fifteen years to survey. It was done in '52. I have been there since, but not with the compass; only once,
11 years ago, I passed through. There was no houses—no build-
32 ings—on the island when we made the survey, except a shanty throwed up for a few engineers from St. Louis, that wanted to find out, I suppose, what we were there for. I was acting under the county court; was acting under Jonathan Moore, as assistant. Mr. Holbrook and myself were appointed by the county court as assistants to him, and we went down and made that survey. That is (referring to his plat) a plain plat made for my own private use. The landing of the Wiggins Ferry Co. was south of the island in '52. They couldn't cross where we were. I don't know about their putting their landing on the island after the dyke was made. I have not been there. I crossed there once just at daylight. I have not been there but once in 19 years, and I just passed through there. There was a few houses in what is called East St. Louis, and I think it was the R. R. boat we came across on. I know it was, because we came on the North Missouri R. R. cars. Three of us was carried across. It was the R. R. conveyance, and was put in the train, and I came to Lebanon, and I have never been there since.

You are welcome to that plat. It was made from John Messenger's survey in 1803.

(The above plat and another are marked Defendant's Exhibit 1, and, Def't's Exhibit 2, and offered in evidence.)

(Here follow 2 maps, marked page 32.)

33 WILLIAM MCCLINTOCK, being duly sworn, testified as follows:

I first seen the Mississippi River on the evening of the 19th of March, 1819. I did not notice the island that was called Bloody Island till the next day. I could not say precisely, nor near possibly, how far out in the river; but I suppose it was from the Illinois shore to the edge of it from 200 to 300 yards apparently. The Wiggins ferry-landing was not at all when I first knew the island. It was then called Campbell's ferry. The crossing, Cahokia Creek, the point then known was the old Pensonean House in Illinoistown. The crossing of the Cahokia Creek was on a bridge immediately below the corner of that house, and the Campbell's ferry, then on the Mississippi, was a little below that bridge; apparently it was a half mile or more to the foot of Bloody Island. Subsequently to 1819, I have been to St. Louis, till the year 1850. I have been less to St. Louis than I was the first ten years I was in the country. Till the building of the dyke the channel between the island and the Illinois shore widened. A' one time the deepest water was on this side of Bloody Island. The main channel of the river was, in ordinary times, this side of the island. At one time it was difficult for boats, heavy and of deep freight, to get to the harbor of St. Louis. There was at one time

from the head of Bloody Island to this shore some improvements made with a view of throwing the channel to St. Louis. I never examined them; wasn't there at the time of their making. I only know of it from report. I know now those sands-bars that have formed below the island only in passing. I see there was bars. There was water where the present bank is till the dyke was made. The Mississippi River bank kept continually washing away. The town of Washington was above what is now and was then the Wiggins ferry. I used to stop
34 sometimes in the town of Washington, because I was a little nearer the then ferry than at Illinoistown, and I thought a little better accom'odation. The Mississippi River was washed away more or less ever since I first knew it at that point till the dyke was made, and it was stopped by riveting. Those sand-bars south of Bloody Island were produced by washing of the bank there by the water, in my opinion. After the dyke was made and the river thrown to wash away Duncan's Island on the other side, that was the cause to give a harbor to St. Louis. The river left this side from the fact that there was an eddy formed in water; and the rise of the water bringing the sand in that eddy it sunk there and formed those bars that are there now.

Cross-examination:

That is the old Illinois shore; a great many years perhaps this land has been washed away between Cahokia Creek opposite the Thomas House. I am not able to locate it now whatever; it was half a mile from the house to the bank of the river. I cannot say that it was the flood of '44 that turned it into the Mississippi River, but I know that it first washed away the house, and it eventually came in a little below or about the place of the Southern R. R. I have travelled over the R. R's more to St. Louis than any other way. As to these lines, gentlemen, I know nothing about. At the east bank of the Mississippi the land washed away. I think that the first accumulations were further out into the river adjoining those islands. At one time I was going on a steamboat and we run on a bar here. They had a diffiulty of getting into St. Louis and had to incline more to the Illinois shore, and we run on a bar and couldn't get into St. Louis till we took the channel up on this side of the river. This was, I believe, before the dyke was made, because I
35 was in business with John D. Hughes here; and at the time the dyke was made, I was in the clerk's office. From the time I quit selling goods at Belleville, I didn't go to St. Louis so often. I don't know who the land belonged to that was washed away. There was a log-house where Singledon used to live, and I happened to be crossing from the Illinois to the Missouri shore, and I saw that house fall into the river. I don't know of the pretty large store of Singleton being washed away, but I have no doubt it was. I was sleeping in the house below Wiggins' boarding-house, a tavern, one night, and the bank kept washing away, as usual; and a tree fell just above the house, and the roots of that tree held it in the bank, but it washed under the corner of the house from ten to 15 feet. I concluded to stay on the shore-side and got out of the house. The next day they got the house removed back further. What is now called the bank is certainly further west than it was at one time. There is no doubt about the ferry co. putting their landing on the island after the dyke was made. I did know that somebody put rock-work there to prevent the west side of the island from washing away after that; at least there was rock-work constructed there. The riveting of the island kept the wash from it, and then when it overflowed in this eddy the sand settled and filled up between this

bar that I told you of in the Mississippi River and that . Putting rock in front of that island by the Wiggins Ferry Co. I think helped to keep it from washing away.

Redirect examination:

Below the Bloody Island, as it then was, there was a pass-way for the ferry-boats and other boats to St. Louis. Below the pass-way there was a bar formed on-to which I stuck two hours on a boat re-
36 turning from the east to go into St. Louis—a bar formed that had no connection with the shore or with Bloody Island—it had no connection with the island nor with the eastern shore of the Mississippi River. That was as far back as 1839, '40, or '41. I travelled the river from '36 till '39.

Col. JOHN THOMAS, being duly sworn, testified as follows:

(Witness is shown the first map.) In regard to the location of the land I have no knowledge, I know a piece of land that is run through by the Cahokia Creek below Bloody Island. I cannot tell you what year it became land. When I first traveled the Mississippi, I think it was in May, 1818. At that time I don't recollect of seeing Bloody Island at all. It may have been owing to the tolerably high stage of water. Subsequently I noticed a small island there—Bloody Island. The ferry-boat then generally passed below Bloody Island—the main ferrying—and it continued that way. The Bloody IslandB ar increased and the bars below, and, as Mr. McClintock stated, there was a channel where the boats went, and below that in times of low water another bar appeared, and this continued pretty much in that way, according to my recollection, below the island till the construction of the dyke, and subsequent to that the sand filled up and it is all connected together. I don't recollect the year the dyke was constructed, but I suppose it was along about '52 that the dyke was constructed. It was after '44 I know. There was bars in '52 below the levy here and where this creek runs through. There was quite a channel between them and the main land. They were not connected with Bloody Island. At the time of low water they were separate bars; in time of high water it was all covered.

37 Plaintiff counsel now introduced a law of the U. S., approved March 3rd, 1791, (vol. 1, U. S. Statutes at Large, page 221.)

Also, law of '69, approved July 15th, 1870, entitled chap. CCCI.—

JULY 15TH, 1870.—Title of the United States to certain lots, &c., in St. Clair County, confirmed to said county.

"An act to confirm title to certain lands in Illinois.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the title of the United States to all lots, outlots, tracts, pieces, parcels, and strips of land in St. Clair County, State of Illinois, lying and situate outside of the United States surveys, as noted in the field-notes of the United States surveyors, and on the Mississippi River, near surveys seven hundred and sixty-six, six hundred and twenty-four, and five hundred and seventy-nine, and near and adjacent to fractional sections one, two, eleven, and twelve, town[ship] one north, range ten west, third principal meridian, be, and the same is hereby, confirmed and granted to said St. Clair County, in said State:

Proviso. Provided, That nothing herein shall apply to the ancient French commons in said county.

"Approved July 15, 1870."

Also, a law of Illinois, in '59, entitled "An act for the sale of swamp-lands." Statutes of 1859, page 200.
Also, session laws of '69, page 243.
Plaintiff rests.

38 Def't's counsel read in evidence the report of Michael Jones, dated January 18th, 1813, in favor of the claim of Pierre Condaine, on the east bank of the Mississippi, fronting the town of St. Louis, in vol. 2 of American State Papers, page 615, as published by Duff Green, in A. D. 1834. Also, an act of Congress of April 16th, 1814, referring to vol. 3, U. S. Statutes at Large, pages 125 and 126, confirming said report & claim.

Also, certified copy of plats and field-notes of certain surveys made in January, 1815, after this confirmation by Congress.

SPRINGFIELD, *June 18th*, 1871.

Survey No. 787—Claim No. 2667.

Surveyed for the heirs of Pierre Condaire, who claims in right of Pierre Condaire, 400 acres of land on the east bank of the Mississippi River, and opposite the town of St. Louis.

Beginning at a post on the northwesterly of the heirs of Richard McCarty's survey, No. 626, claim No. 1316, from which a hackberry 6 inches in dia. bears S. 51° E. 22 links, and a honey-locust 3 inches in dia. bears N. 30° W. 12 links; thence S. 50° W. with said line of said survey 17 poles to a post from which an elm 18 inches dia. bears S. 25° W. 40 links; thence S. 51° 10′ E. with another line of the heirs of Richard McCarty's said survey, (passing a corner of Nicholas Jarrot's survey, No. , claim No. 100, at 36 poles,) 134 poles to a post on the westerly side of the river L' Abbie, or Cahokia Creek; thence down the said river or creek with the different courses thereof, S. 74 W. 9 poles, N. 28 W. 26½ poles, N. 80 W. 17 poles, S. 66 W. 17 poles, S. 10 W. 13 poles, south 32 poles, S. 5° W. 30 poles, S. 21 W. 182 poles, S. 12 E. 50 poles, S. 23 E. 22 poles, S. 12 W. 22 poles, S. 37° E. 88 poles, S. 20 E. 54 poles to a post, from which ; thence N. 85° W. 174 poles to a post
39 on the bank of the Mississippi River, from which ; thence N. 5° E., up the Mississippi River, and binding therewith (passing the southwesterly corner of Nicholas Jarret's survey, No. 579, claim No. 99, at 6 poles,) 551 poles & 10 links, to a post northwesterly corner of Nicholas Jarret's survey. No. claim No. 100, from which a sycamore 36 inches dia. bears S. 21° W. 29 links; thence S. 85° E., with the upper line of the last-mentioned survey 88 poles to the beginning.

JAN'Y 15TH, 1815.

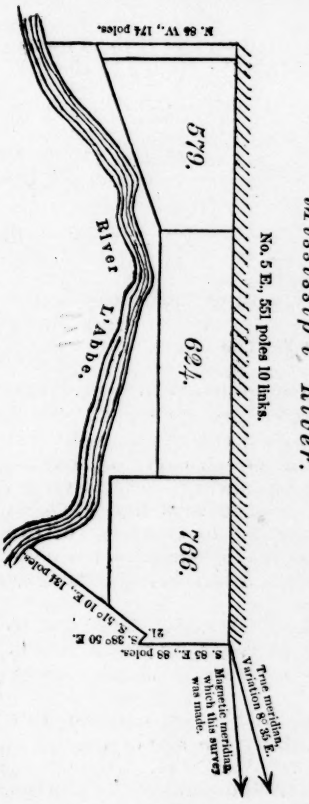
True meridian V., 8° 25′ E. magnetic meridian, by which this survey was made.

A true copy of the original field-notes on file in this office.
W. W. H. LAWTON,
Custodian U. S. Surveys.

(Here follows map, marked page 39.)

Also another plat and field-notes obtained from the land-office at St. Louis, before it was removed to Springfield, to wit:

Survey No. 786—Claim No. 2667.



Surveyed for the heirs of Pierre Condaire, who claims in right of Pierre Condaire, 400 acres of land on the east bank of the Mississippi River, and opposite the town of St. Louis.

Beginning at a post in the northwesterly line of the heirs of Richard McCarty's survey, No. 626, claim No. 1316, from which a hackberry 6 inches diameter bears S. 51 E. 22 l'ks, and a honey-locust 3 inches diameter bears N. 30 W. 12 40 links; thence S. 38 50 W. with said line of said survey 17 poles to a post, from which an elm 18 inches diameter bears S. 25 W. 40 links; thence L. 51 10 E, with another line of the heirs of Richard McCarty's said survey, (passing a corner of Nicholas Jarrot's survey, No. , claim 100, at 36 poles,) 134 poles to a post on the westerly side of River L' Abbe, or Cahokia Creek; thence down the said river or creek with the different courses; thence of 574 W. 9 poles, N. 88 W. 26½ poles, N. 80 W. 17 poles, S. 66 W. 17 poles, S. 10 W. 13 poles, south 32 poles, S. W. 30 poles, S. 21, W. 182 poles, S. 12 E. 50 poles, S. 23 E. 22 poles, S. 12 W. 22 poles, S. 37 E. 88 poles, S. 20 E. 54 poles, to a point from which thence N. 85 W. 174 poles, to a point on the bank of the Mississippi, from which thence N. 5 E. up the Mississippi River, and binding therewith, passing the southwesterly corner of Nicholas Jarrot's survey 579, claim No. 99 at 6 poles, 551 poles & 10 links, to a post northwesterly corner of Nicholas Jarrot's survey, No. , claim No. 100, from which a sycamore 36 inches diameter bears S. 21 W. 29 links; thence S. 85 E. with the upper line of the last-mentioned survey 88 pole, to the beginning.

JANUARY 15, 1815.

OFFICE OF THE U. S. RECORDER LAND TITLES,
St. Louis, March 31st, 1868,

This is to certify that the foregoing is correctly copied from page 145 of the original book of field-notes, No. 2, of private surveys in Illinois, which surveys it appears were executed by W'm Rector and Thomas Rector. (See page 3 of said book, which is on file in this office.)

(Signed) FRED'K MOSBERGER,
U. S. Recorder L. T.

[U. S. stamp 5c. F. M. March 31, 1868.]

41 *Survey No. 786.*

Plat and description of the survey of a tract of land of 400 acres situate in township 2 north of the base-line, range 10 west of the 3d principal meridian, in the State of Illinois, executed on the 15th of January, 1815, by Messrs. Rectors, surveyors of private claims in the district of Kaskaskia.

This tract was claimed by the heirs of Peirre Condaire, in right of Pierre Condaire, who claimed, in virtue of actual improvements and cultivation, under the act of Congress of the 3rd of March, 1791, entitled "An act for granting lands to the inhabitants and settlers at Vincennes and the Illinois country in the territory northwest of the Ohio, and for confirming them in their possessions." The claim was recorded as No. 2667, conformably to the provision of the act of Congress of the 26th of March, 1804, entitled "An act making provision for the disposal of the public lands in the Indiana Territory, and for other purposes," affirmed by the board of commissioners, under the act of Congress of the 20th of February, 1812, entitled "An act for the revision of former confirmations, and for confirming certain claims to land in the district of Kaskaskia," and confirmed by the second section of the act of Congress of the 16th April, 1814, entitled "An act confirming certain claims to land in the Illinois Territory, and providing for their location." See American State Papers, vol. II, page 615, Duff Green's edition, 1834—note. This tract is with or includes the following surveys, viz:

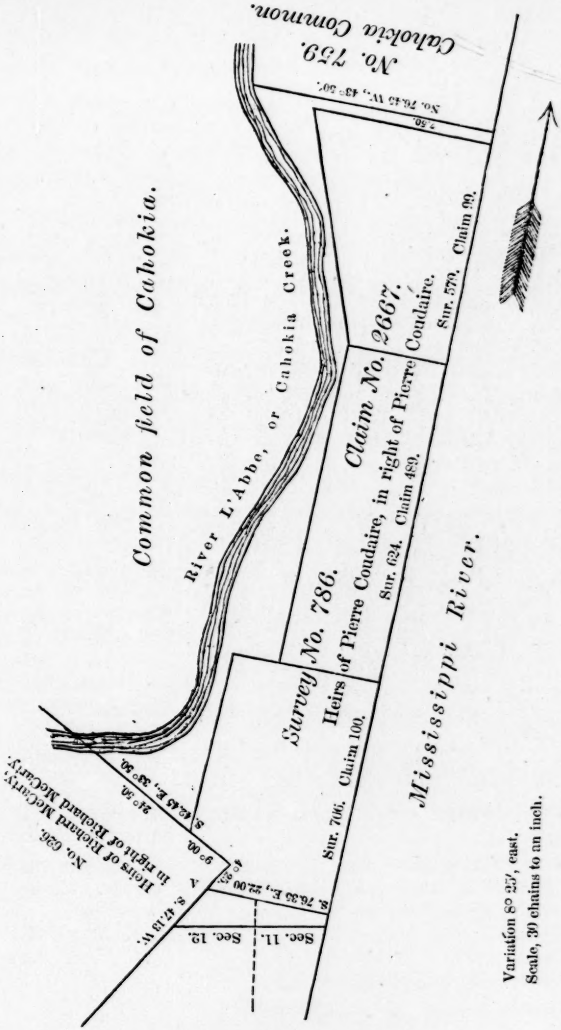
1st. Survey No. 579. Claim No. 99, of 100 acres, confirmed to Nicholas Jarrot, in right of Jean Dumouchelle, by the act of Congress of the 1st of May, 1810, entitled "An act confirming the decisions of the commissioners in favor of the claimants of land in the district of Kaskaskia." See American State Papers, vol. II, p. 141.

2d. Survey No. 624. Claim No. 489, of 100 acres, confirmed to
42 heirs of James Piggot, in right of James Wear, by the above-recited act of the 16th April, 1814. See American State Papers, vol. II, p. 206.

3rd. Survey No. 766. Claim No. 100, of 100 acres, confirmed to Nicholas Jarrot, in right of Joachin Couillard, by the act of the 1st of May. W. 10. See American State Papers, vol. II, p. 141.

4th. Part of Cahokia Common, survey No. 759, confirmed by the act of 1st of May, 1810. See American State Papers, vol. II, p. 167.

T. 2 N., r. 10 W. of 3d p'l m'n.



43 *Description.*

Beginning at a post in the northwest boundary of survey No. 626, in the name of heirs of Richard McCarty, in right of Richard McCarty, corner to this survey, to survey No. 766, in the name of Nicholas Jarrot, in right of Joachin Couillard, and to fractional section 12, township 2 north, range 10 west, from which a hackberry, 6 inches in diameter, bears S. 42° 35 E., (551 E.,) 22 links distant, and a honey-locust, 3 inches in diameter, bears N. 21 35 W., (N. 30 W.,) 12 links distant.

Thence S. 47 15 W., (S. 38 50 W.,) with the northwest boundary of the Richard McCarty survey, which is also a line of the Nicholas Jarrot's survey, 4.25 chains, to a post, the west corner of the Richard McCarty survey, and a corner to this and to the Nicholas Jarrot surveys, from which an elm, 18 inches in diameter, bears S. 33 25 W., (S. 25 W.) 40 links distant.

Thence S. 42 45 E., (S. 51 10 E.,) with the southwest boundary of Richard McCarty surveys, at 9 [illegible], a post, corner to the Nicholas Jarrot survey, from which a red-bud, 6 inches in diameter, bears S. 39 35 E., (S. 75 E.,) 16 links distant, and at 33.50 chain' a post, on the western and right bank of the river L'Abbe or Cahokia Creek.

Thence down and along the Cahokia Creek S. 82 25 W., (S. 74 W.,) 2.25 chains; thence N. 79° 35′ W., (N. 88 W.,) 6.62½ chains; thence N. 71 35 W., (N. 80 W.,) 4.25 chains; thence S. 74° 25′ W., (S. 66° W.,) 4 25 chains; thence S. 18 25′ W., (S. 10 W.,) 3.25 chains; thence S. 8 25 W., south 800 chains; thence S. 13° 25 W., (S. 5 W.,) 7.50 chains; thence S. 29 25 W., (S. 21 W.,) 45.50 chains; thence S. 3 35, (S. 12 E.,) 12.50 chains; thence S. 14 35 E., (S. 23 E.) 5.50 chains; thence S. 20 25 W., (S. 12° W.,) 5.50 chains, to a post in the east boundary of survey No. 579, in the name of Nicholas Jarrot, in right of Jean Dumouchelle, the most northern corner of the Cahokia Common, sur-
44 vey No. 759; thence S. 28 35 E., S. 37 E., 22 chains; thence S. 11 35 E., (S. 20 E.,) 13.50 chains, to a post, corner to this survey.

Thence N. 76 35 W., (N. 85 W.,) 4350, to a post on the left bank of the Mississippi River; corner to this survey.

Thence up and along the left bank of the Mississippi River, N. 13 25 E., (N. 5 E.,) at 1.50, a point the southwest corner of survey 579, and a corner to the Cahokia Common survey, No. 759, from which a sycamore, 20 inches in diameter, bears S. 76 35 E., (S. 85 E.,) 2.50 chains distant; and at 137.85 chains a post, in the northwest corner of survey No. 766, and a corner to this survey, and to fractional section 11, from which a sycamore, 36 inches in diameter, bears S. 29 25 W., (S. 21 W.,) 29 links distant.

Thence S. 76° 35′ E., (S. 85° E.,) with the north boundary of survey No. 766, 22 chains, to the beginning corner.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, March 31, 1868.

This is to certify that the foregoing is correctly copied from pages 335 and 336 of a book entitled "Records of Pr. Surveys in Illinois," which book is preserved up to this day in this office.

(Signed) FRED'K MOSBERGER,
U. S. Recorder, L. T.

[U. S. stamp, 5 c. F. M. March 31, 1868.]

Fee, $10.00.

45 Also, patent of the U. S. for the Condaire claim, dated May 31st, 1848, to wit:

Plat and field-notes of survey 786, *from St. Louis U. S. Land-Office.*

46 The United States of America to all whom these presents shall come, greeting:

Know ye that there has been deposited in the General Land-Office a certificate numbered twenty of the register of the land-office at Kas-

kaskia, Illinois, whereby it appears that by the act of Congress approved on the sixteenth day of April, one thousand eight hundred and fourteen, entitled "An act confirming certain claims to land in the Illinois Territory, and providing for their location," the improvement claim of Pierre Condaire has been confirmed for four hundred acres, being entered as number two thousand six hundred and sixty-seven, in favor of the heirs of P. Condaire, in right of said Pierre Condaire, in the report dated the eighteenth day of January, one thousand eight hundred and thirteen, of Michael Jones, one of the commissioners at Kaskaskia, Illinois, and which claim being represented on the connected plat of the Kaskaskia district, is situated in township two north, of range ten west of the third principal meridian, Illinois, and is designated on the township plat of said township as survey-number seven hundred and eighty-six, and on the said township plat is represented as lying between Cahokia Creek and the Mississippi; and as including survey number seven hundred and sixty-six, (for claim number one hundred,) survey number six hundred and twenty-four, (for claim number four hundred and sixty-nine,) and survey number five hundred and seventy-nine, (for claim number ninety-nine.)

There is, therefore, granted by the United States unto the said heir of P. Condaire, in right of said Pierre Condaire, or his legal representatives, and to his or their heirs, the tract of land embraced in the aforesaid claim, number two thousand six hundred and sixty-
47 seven, and survey number seven hundred and eighty-six, as above designated, subject to the claims included in the aforesaid surveys, numbers seven hundred and sixty-six, six hundred and twenty-four, and five hundred and seventy-nine, which are excepted and reserved from the transfer by these presents: to have and to hold the tract embraced in the aforesaid claim number two thousand six hundred and sixty-seven, and survey number seven hundred and eighty-six, with the appurtenances, unto the said heir of Pierre Condaire, in right of said Pierre Condaire or his legal representatives, and to his or their heirs and assigns forever, with the said exception and reservation of the aforesaid surveys number seven hundred and sixty-six, six hundred and twenty-four, and five hundred and seventy-nine.

In testimony whereof I, James K. Polk, President of the United States, have caused these letters to be made patent, and the seal of the General Land-Offices to be hereunto affixed. Given under my hand, at the city of Washington, the thirty-first day of May, in the year of our Lord one thousand eight hundred and forty-eight, and of the Independence of the United States the seventy-second.

By the President:

JAMES K. POLK,

[SEAL.] By J. K. STEPHENS, *Ass't Sec'y.*

S. H. LAUGHLIN,

Recorder of the General Land-Office.

Recorded vol. 10, pages 207, 208, 209.

Also the Jarrot patent, dated May 1st, 1848.

48 The United States of America to all to whom these presents shall come, greeting:

Know ye that there has been deposited in the General Land-Office a duplicate certificate numbered two hundred and twelve of the register of the land-office at Kaskaskia, Illinois, whereby it appears that by the

act of Congress approved on the first day of May, one thousand eight hundred and ten, entitled "An act confirming the decisions of the commissioners in favor of the claimants of land in the district of Kaskaskia," the claim of Nich'l Jarrot in right of Jean Dumochell has been confirmed for one hundred acres, being the militia claim of said Jean Dumochell, which claim is entered as number ninety-nine in the report dated the thirty-first day of December, one thousand eight hundred and nine, of the Kaskaskia commissioners, and has been designated as survey number five hundred and seventy-nine on the connected plat of the district of Kaskaskia, as returned by the surveyor-general, and is situated in township two north, of range ten west of the third principal meridian, Illinois.

There is, therefore, granted by the United States unto the said Nich'l Jarrot, in right of said Jean Dumochell, or to his legal representatives, and to his or their heirs, the tract of land above described: to have and to hold the said tract, with the appurtenances, unto the said Nich'l Jarrot, in right of said Jean Dumochell or his legal representatives, and to his or their heirs and assigns forever.

In testimony whereof I, James K. Polk, President of the United States, have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed. Given under my hand, at the city of Washington, the thirty-first day of May, in the year
49 of our Lord one thousand eight hundred and forty-eight, and of the Independence of the United States the seventy-second.

By the President:

JAMES K. POLK,
[L. S.] By J. K. STEPHENS, *Ass't Sec'y.*
S. H. LAUGHLIN,
Recorder of the General Land-Office.

Recorded vol. 10, page 211, 212. Ex'd.

Also two United States patents to Samuel Wiggins for Bloody Island, both dated June 9th, 1825. One is for fractional section 11, township 2 north, range 10 west, containing $128\frac{86}{100}$ acres. The other is for fractional section 2, township 2 north, range 10 west, containing $3\frac{47}{100}$ acres.

Also a plat of Bloody Island and the contiguous lands taken from the custodian of the U. S. surveys.

(Here follows map, marked page 49.)

50 Col. VITAL JARROT, being duly sworn, testified as follows:

(Hilgard's plat is here shown witness.) I find the tract of land described in the declaration. The first Ferry Division does not show on this map. I know the land in controversy. I was born and raised in that neighborhood. I know there is a large accretion formed there. I don't know exactly when it first commenced forming. Before that accretion formed, the west bank of those surveys had been washed in by the Mississippi. I cannot fix the time the accretions commenced forming there. It was a matter that didn't concern me. It was a number of years ago, though there were various changes took place in the river at different periods, and at what time accretions commenced forming there I cannot fix in my memory.

At one time it was a mooted question whether the main channel was on the west or east side of the island. The boats, though, continual' plied on the west side, though there was a great deal of the water on this side

of the island. I think there was occasionally boats passed up on the east side of the island. I think I heard them coming up there, not as the channel but on business. Illinoistown was only a small place then. I recollect the changes on the island from time to time. From my first observation of that island it had a tendency to wash away at the head of the island and form at the foot. I noticed it before the dyke was built; there was frequently large sand-bars at the east and south of the island. In low water it extended considerably down. For years it kept increasing on the east and south. As the river made inroads on the main shore the island kept filling up on the east side correspondingly. The greatest change took place in '51. The stone that had been put there to protect the main shore in '51—in the flood the water washed around that pier and cut across into the claim above that. I
51 believe it cut nearly clear across—within a few feet of clear across that claim. Since that the sand has been accumulating there. The first thing that protected the island on the west side from washing away was the stone breakwater that was put there by the Government of the U. S. Some of that was above the island, up at Brooklin, and some at the island. The next was riveting the shore by the Ferry Co., lining the west side with stone. They deposited stone there.

Q. Have you any idea of the expenses that was incurred?

(Objected to; objection sustained.)

" The riveting the shore protected the shore; kept the water in certain bounds. The island forms a continuous sand-bar now, clear down to the Pittsburg coal-dyke. There is something separating this part of the island from the main land. The Cahokia Creek at this time has no outlet at all; it runs the most of the year, but at this time there is no water at all down there. It runs down to the southern line of the survey and stops. There is not a drop of water communicating with the Mississippi; there has not for a month or so. The creek has been dammed. I judge that there was, about a month ago, a little more. It used to run down to Cahokia. The Cahokia Creek was turned above as on Hilgard's plat, in '51. It meandered through the sand-bar; in fact, some of it run clear up north sometimes. It used to run down by Cahokia, and the flood of '51 cut almost entirely across that survey; the creek turned there into the bar and meandered through it. It is not properly laid down here. Here is a turn so very abrupt that the creek runs almost due north right in here. Before the Illinois and St. Louis Coal Company had put in their dyke there, it used to run down
52 below there. They threw some obstructions up there to keep it from running down there, and turned it through that sand-bar up above there, and the Ferry Co., to get rid of it, threw in some obstructions, and threw it back into the same channel where it run before. There is not sufficient water to run over their dam, and the consequence is, it is a pond and has no outlet.

(Defendant's counsel then introduced a deed in fee-simple from Joseph Condaire to N. Jarrot, dated the 17th of April, 1809, purporting to convey said Condaire claim, and describing said Joseph Condaire as the sole heir of said Pierre Condaire, duly acknowledged and recorded; also the last will and testament of said Nicholas Jarrot, duly proved in the county court of said county on the 18th of December, 1820, and translated in 2 Gil. Ill. R., pp. 135 to 137 inclusive, giving Julia Jarrot, his widow and executrix, authority to sell his real estate at her discretion, also a deed in fee-simple from said Julia Jarrot under said will to Samuel Wiggins for the land patented to said Jarrot as aforesaid, and for said Condaire claim and survey, dated July 13th, 1822.)

Cross-examination of Col. Vital Jarrot:

I was shown this plat, (Hilgard's plat;) I noticed the western line of survey 579. I don't recollect that I ever examined the field-notes of this survey called the Jarrot survey. This is a straight line as far as I see from this plat. The first formation that was noticed in front of those old surveys were formed south and east of Bloody Island and joining it. At my first observation of it there was no sand-bars independent of Bloody Island.

53 (Witness is here shown the largest and most painted map.) That which is marked yellow is surveyed as being those new formations. The U. S. has never surveyed those sand-bars that I know of. I see what the map intends to convey, that that was the old line (pointing) I suppose what is colored green here, intending to indicate the bank of the river as it was about the time time this dyke was made, leaving only fractions of those surveys, the balance being washed away by the river, is nearly correct. There are pools of water along here on the foot of Bloody Island; no running water. The Cahokia Creek runs through it. The Cahokia Creek is not marked correctly on this map. The pond or lake in ordinary stages of water is above here, (pointing on the map,) and here is the creek. Before these formations were made the river run in a sweeping, rounding direction; it come around in a kind of half-moon. I don't think it was exactly as it is represented here by this green line. Not all of this before it was filled up was the Mississippi River; as late as '54 no boats could run here. Perhaps this filling up was localized in a great measure by the dykes, but the filling up was going on. As the river made in next the Illinois bank the island enlarged correspondingly. If the dyke had not been built the river would have had all of East St. Louis before this time. I don't know the extent of the Livingston tract. I understood he had a lease below on that sand-bar. I don't know how many acres. I could give but a mere guess. I never saw this lease and I don't know the extent of it. I know he had a cabin down on the sand-bar and I understood he had a lease.

54 (Plaintiff's counsel wishes to establish the *of the* value of the tract only for the purpose of bringing it within the jurisdiction of the U. S. Supreme Court.

Def't counsel objects, and says that can be shown by affidavit. The court sustains the objection.)

Redirect examination:

I pointed out a slough as the west bounday of this Jarrot tract. I have looked at the field-notes of the Condaire tract.

Q. State to the jury what is the west boundary of that tract.

(Objected to; the court allows the question to be asked if it was forgotten in the direct examination.)

A. The field-notes bound it by the river.

(Objected to.)

Q. How are all these U. S. surveys up and down the bounded generally?

(Objected to; the court confines the examination to the land in question.)

The field-notes makes the river the western boundary. Part of the Condaire claim is now on the island; what we call the island. There was somewhere about 100 acres outside of those three claims. The Condaire claim covers the other claims, and the notes don't regard the divisions. The notes gave all of 300 acres. The portions that are not

covered by these claims amount to about 100 acres. All these lands in controversy lie west of the Condaire tract.

Recross-examination:

(Witness is shown paper marked "1.") This Condaire tract
55 covers most of the other claims. I could not tell whether the western line, as indicated on the field-notes of the Jarrot tract, are precisely the same as the Condaire tract. The Condaire claim tells you binding with the river. Notwithstanding the notes go from one point to another, it says "binding therewith." One says beginning at the bank of the Mississippi River, and another begins at the corner. These don't begin at the same place; they may correspond, but this begins away from the river and runs the other way. It possibly may be the same; possibly exactly. One begins at one corner and the other at another.

Defendant's counsel read in evidence the original deed from Samuel Wiggins and wife to O'Fallon and others, dated August 1st, 1831, for the land on Bloody Island, and the Condaire and Jarrot claims and surveys.

Also private laws of 1853, page 193, dated Feb'y 11th, 1853.

Also proceedings of the St. Clair circuit court by which the property was sold by the master in chancery. Also deed made by the special master on the 1st of December, 1857, embracing and conveying this land on this side of the river and the ferry franchise to the Wiggins Ferry Company.

Offers also private laws of '67, volume I, page 938.

56 Col. VITAL JARROTT recalled:

I find a discrepancy; it is this: When it comes down here near the river in this that you got from Springfield it strikes the river; thence up the river; placing the southwesterly corner of the Jarrot survey at six poles; whereas, taking that first data of six poles, it is only 166 poles from that point to the upper one, whereas I make it 550. There is that discrepancy. There is a mistake here somewhere, because if you take the southwesterly corner to be only six poles, then running the length of this Jarrot survey, 160 poles, you have but 166, whereas this makes it 550. If either of these is correct they don't agree. I have not a survey above here to which it might refer. It says, "the last-mentioned survey;" it makes the two points the same. It says "passing the southwesterly corner and the northwesterly corner." The intervening space it don't say anything about. There is some omission, I suppose, that makes it unintelligible.

It seems that this upper claim and the lower one are both called Jarrot claims. That is what makes the discrepancy. By taking the length of the three claims it makes that distance right. It makes it as to the distance, but they mention it on the notes as the above-mentioned survey; 551 would *would* make the length of these three surveys.

I never was a real surveyor. I have surveyed some for my own use. I have not surveyed any for a good many years. I have no compass now. Some years ago I used to survey some for my neighbors and myself—those bottom-lands. I don't say that the boundaries are the same, but they start the same and come out the same. In these three surveys
57 there is nothing said about binding the river, if I recollect right, and there might be some pieces of land left between those claims and the river, which the Condaire claim would cover. It is very

possible there was. It is not likely the river was so straight that they could run each of those three tracts its whole length straight and follow the river; the river was not that straight.

Defendant's close.

This was all the evidence in the case; the plaintiff then asked the court to instruct the jury as follows:

Instructions for plaintiff.

1. Accretion is an addition of soil by gradual deposition, through the operation of natural causes, to the real estate already in possession of the owner. (2 Washb. on Real Property, sec. 551; 1 Bouvier, "alluvion," page 94; 3 Kent, 428;) and if the jury believe from the evidence that the land in question was not formed by a gradual deposition, through the operation of natural causes, but by artificial means, such as making dykes, or turning the river by wing-dams or other constructions, from its natural course, such lands do not fall within the legal meaning of accretions, and do not belong to the riparian owner, and the defendants have no title thereto by virtue of their being accretions to the land they originally owned on the river.

(Refused.)

58 2. No owner of land near a river is entitled to any accretion (and accretions are formed only by gradual deposition through the operation of natural causes, not artificial ones) if his land on the bank of the river is bounded by certain well-defined lines and contains a certain well-defined quantity of land; and if the jury believe from the evidence that survey 579 was what is called "militia donations," under the act of Congress of March 3rd, A. D. 1791, by the sixth section of which the governor of the northwest territory was authorized to make a grant of land, not exceeding one hundred acres, to certain persons who had performed militia duty, said land to be laid out in such form and place as the said governor might direct, and that said grant was laid out by metes and bounds, the owners of said grants are not entitled to claim any lands, whether accretions or not, beyond said metes and bounds and beyond the specific quantity so granted.

(Refused.)

3. Whenever it clearly appears that the grantor intended to limit the grant by defined lines and a certain quantity, this intention must prevail, and the grantee cannot claim beyond the grant, (see Laffin vs. City of Chicago, 49 Ill., 175 & 176;) and if the defendants claim under these militia grants they cannot claim any more than what was therein given. (3 Scam., 521, Middleton vs. Pritchard et al.)

(Refused.)

59 4. If the jury are satisfied from the evidence that in the year 1810 and from that time on until the time dykes and other artificial obstructions were made in the river and above the lands in question, there was an arm of the Mississippi River running between the old bank of the Mississippi River on which the said claims in question were located, full of water in all ordinary stages of the river, and, if it were not for artificial obstructions, a part of the Mississippi River would still run where the lands in question now are, then and in that case the lands so reclaimed from the river do not belong to the owners of the land on the old bank, even if they could claim the river as a boundary, but belong to the grantees of the United States, and the jury must find a ver-

dict for plaintiff for all the lands in question, if the same have not been included within the boundaries of the said claims and surveys 579, or *or* 786, called Condair's survey; provided plaintiff has shown title to the lands in question, or is entitled to the possession thereof.

(Refused.)

5. The original Bloody Island being in greater part sectional land, to wit, in fractional sections 11 & 2, town. 2 north, range 10 west of the 3rd principal meridian, no accretions can be claimed in any case except lands gradually formed, and without artificial causes, in front of the river and within the projected lines of said section westwardly or eastwardly on the eastern arm of the river. Formations either above or below said section lines belong to the owner of the soil near which the river formerly flowed, and if the lands in question are formed above or below the said sectional lines running from east to west, they do not belong to the owners of the original Bloody Island, even if they were accretions produced as defined in the former instructions for plaintiff, and the title is in the grantees from the sovereign power of the soil heretofore under water.

(Refused.)

60 6. The court instructs the jury that if they are satisfied from the certificate of the county surveyor and the evidence in this cause that the premises in controversy are situate outside of the lines of the united surveys, as run by the United States surveyor, then, and in that event, they should find for the plaintiff, if all the material allegations of the declaration have been made out, unless the defendants show a superior title to said premises.

(Refused.)

7. The proprietory right to the soil covered by the waters of the Mississippi River in the territory northwest of the river Ohio was in the United States before the admission of Illinois into the Union, and still remains so unless the same has been granted to the State or to individuals; and if the jury are satisfied from the evidence that the soil west of the western line of survey 579, as run and surveyed by the United States surveyors, has been granted by the United States to the plaintiff, they should find for the plaintiff although they may be further satisfied that the land in controversy did not appear above water until after the admission of the State into the Union, and that it formed in front of the land owned by defendants, unless the defendant shows a prior and superior grant from the United States to the premises. (See Jones vs. Souland, 24 Howard.)

(Given as modified.)

61 8. The court instructs the jury that the right to large quantities of land thrown up or deserted by the river Mississippi is not a right inherently to the land adjoining on and fronting on that river, but is a perquisite which the owner of the real estate so adjoining and fronting on the river may hold, possess, and enjoy against every other claimant except the State or United States, or those holding by express grant from the State or United States. (See Woolryct on Waters, see pages 52, 53, et seq.)

(Refused.)

Which instructions the court refused to give, and gave the plaintiff's instruction modified as follows:

The proprietory right to the soil covered by the waters of the Mississippi River in the territory northwest of the river Ohio was in the United States before the admission of Illinois into the Union, and still remains so unless the same has been granted to the State or to individ-

possible there was. It is not likely the river was so straight that they could run each of those three tracts its whole length straight and follow the river; the river was not that straight.

Defendant's close.

This was all the evidence in the case; the plaintiff then asked the court to instruct the jury as follows:

Instructions for plaintiff.

1. Accretion is an addition of soil by gradual deposition, through the operation of natural causes, to the real estate already in possession of the owner. (2 Washb. on Real Property, sec. 551; 1 Bouvier, "alluvion," page 94; 3 Kent, 428;) and if the jury believe from the evidence that the land in question was not formed by a gradual deposition, through the operation of natural causes, but by artificial means, such as making dykes, or turning the river by wing-dams or other constructions, from its natural course, such lands do not fall within the legal meaning of accretions, and do not belong to the riparian owner, and the defendants have no title thereto by virtue of their being accretions to the land they originally owned on the river.

(Refused.)

58 2. No owner of land near a river is entitled to any accretion (and accretions are formed only by gradual deposition through the operation of natural causes, not artificial ones) if his land on the bank of the river is bounded by certain well-defined lines and contains a certain well-defined quantity of land; and if the jury believe from the evidence that survey 579 was what is called "militia donations," under the act of Congress of March 3rd, A. D. 1791, by the sixth section of which the governor of the northwest territory was authorized to make a grant of land, not exceeding one hundred acres, to certain persons who had performed militia duty, said land to be laid out in such form and place as the said governor might direct, and that said grant was laid out by metes and bounds, the owners of said grants are not entitled to claim any lands, whether accretions or not, beyond said metes and bounds and beyond the specific quantity so granted.

(Refused.)

3. Whenever it clearly appears that the grantor intended to limit the grant by defined lines and a certain quantity, this intention must prevail, and the grantee cannot claim beyond the grant, (see Laffin vs. City of Chicago, 49 Ill., 175 & 176;) and if the defendants claim under these militia grants they cannot claim any more than what was therein given. (3 Scam., 521, Middleton vs. Pritchard et al.)

(Refused.)

59 4. If the jury are satisfied from the evidence that in the year 1810 and from that time on until the time dykes and other artificial obstructions were made in the river and above the lands in question, there was an arm of the Mississippi River running between the old bank of the Mississippi River on which the said claims in question were located, full of water in all ordinary stages of the river, and, if it were not for artificial obstructions, a part of the Mississippi River would still run where the lands in question now are, then and in that case the lands so reclaimed from the river do not belong to the owners of the land on the old bank, even if they could claim the river as a boundary, but belong to the grantees of the United States, and the jury must find a ver-

dict for plaintiff for all the lands in question, if the same have not been included within the boundaries of the said claims and surveys 579, or *or* 786, called Condair's survey; provided plaintiff has shown title to the lands in question, or is entitled to the possession thereof.

(Refused.)

5. The original Bloody Island being in greater part sectional land, to wit, in fractional sections 11 & 2, town. 2 north, range 10 west of the 3rd principal meridian, no accretions can be claimed in any case except lands gradually formed, and without artificial causes, in front of the river and within the projected lines of said section westwardly or eastwardly on the eastern arm of the river. Formations either above or below said section lines belong to the owner of the soil near which the river formerly flowed, and if the lands in question are formed above or below the said sectional lines running from east to west, they do not belong to the owners of the original Bloody Island, even if they were accretions produced as defined in the former instructions for plaintiff, and the title is in the grantees from the sovereign power of the soil heretofore under water.

(Refused.)

60 6. The court instructs the jury that if they are satisfied from the certificate of the county surveyor and the evidence in this cause that the premises in controversy are situate outside of the lines of the united surveys, as run by the United States surveyor, then, and in that event, they should find for the plaintiff, if all the material allegations of the declaration have been made out, unless the defendants show a superior title to said premises.

(Refused.)

7. The proprietory right to the soil covered by the waters of the Mississippi River in the territory northwest of the river Ohio was in the United States before the admission of Illinois into the Union, and still remains so unless the same has been granted to the State or to individuals; and if the jury are satisfied from the evidence that the soil west of the western line of survey 579, as run and surveyed by the United States surveyors, has been granted by the United States to the plaintiff, they should find for the plaintiff although they may be further satisfied that the land in controversy did not appear above water until after the admission of the State into the Union, and that it formed in front of the land owned by defendants, unless the defendant shows a prior and superior grant from the United States to the premises. (See Jones vs. Souland, 24 Howard.)

(Given as modified.)

61 8. The court instructs the jury that the right to large quantities of land thrown up or deserted by the river Mississippi is not a right inherently to the land adjoining on and fronting on that river, but is a perquisite which the owner of the real estate so adjoining and fronting on the river may hold, possess, and enjoy against every other claimant except the State or United States, or those holding by express grant from the State or United States. (See Woolryct on Waters, see pages 52, 53, et seq.)

(Refused.)

Which instructions the court refused to give, and gave the plaintiff's instruction modified as follows:

The proprietory right to the soil covered by the waters of the Mississippi River in the territory northwest of the river Ohio was in the United States before the admission of Illinois into the Union, and still remains so unless the same has been granted to the State or to individ-

uals; and if the jury are satisfied from the evidence that the soil west of the western line of survey 579, as run and surveyed by the United States surveyors, has been granted by the United States to the plaintiff, they should find for the plaintiff.

62 The defendants then asked the court to give following instructions, which were given accordingly:

COUNTY OF ST. CLAIR
vs.
LOVINGSTON ET AL.
} Defendant's instructions.

1st. In all civil cases the jury is bound by the law as given in instructions, and the party complaining that such instructions are wrong can appeal to a higher court.

COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON AND WIGGINS FERRY Company.

2d. If the jury believe from the evidence that on the 9th of June, A. D. 1825, the Government of the United States patented to Samuel Wiggins the land known as Bloody Island, and that part of the land is accretions to said island formed by overflows of the Mississippi River, or otherwise, then said accretions belong to said Wiggins or his grantees, and neither the State of Illinois nor the United States could afterwards convey any title to said accretions, and the jury should find for the defendant for as to the accretions on said island are concerned. (New Orleans vs. United States, 10 Peters, U. S. R., 662, 717, & 718; The Schools vs. Risley, 10 Wallace, U. S. R., 110; Middleton vs. Pickard, 3 Scam. R., 510; Ensmunger vs. People, 47 Ills. R., 388 & 389; The city of Chicago vs. Laflin, 49 Ills. R., 175 & 176; Jones vs. Soullard,
63 24 How. U. S. R., 41, 64, & 65; Railroad vs. Schumier, 7 Wallace U. S. R., 287, 288, & 289; Land-Office Report of 1868, page 121, &c.)

(Given as modified.)

3d. If the jury believe from the evidence that the heirs or legal representatives of Pierre Condaire had a claim to four hundred acres of land under the act of Congress of March 3d, 1791, and that Michael Jones, under authority of the United States, reported to the proper land-office of the United States in favor of the justice of said claim of four hundred acres, by his report dated January 18th, 1813; and afterwards, to wit, on the 16th of April, 1814, that the Congress of the United States confirmed said report and claim by law; and afterwards, to wit, on the 15th of January, 1815, said claim was surveyed and marked by courses and distances under authority of the United States, and that the west boundary of said four hundred acres was the Mississippi River "and binding therewith;" and that afterwards, to wit, on the 31st day of May, 1848, the Government of the United States patented said four hundred acres of land to the only heir of said P. Condarie or his legal representatives, and to his or their heirs, said land, and that a part of the land in this suit is accretions to said land, occasioned by the overflow of the Mississippi River or otherwise, then said patentee or his grantee are entitled to said accretions, and neither the State of Illinois nor the United States had any right afterwards to convey said accretions, and the jury

should find for the def't for the reasons stated in this first instruction just given.

(Given.)

4th. The meander lines run in surveying fractional portions of the public lands bordering upon navigable rivers are run, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity
64 of the land in the fraction and which is to be paid for by the purchaser. (Middleton vs. Prichard, 3 Scam., 519 to 522; 7 Wal. U. S. R., 272, 286, & 287.) And the patentee of the United States or his grantees are entitled to the accretions thereto on their river-front.

Whether the Wiggins Ferry Company charged too much or too little to railroad companies has nothing to do with this case, and the jury should disregard all such considerations about which there is no proof and could not be in this case.

(Given.)

5th. The owners of land on the Mississippi River are entitled to accretions on their river front, whether such accretions are occasioned by the overflowing of the river or by their own labor and expense, provided the labor and expense are put on to preserve the land of the proprietor. (New Orleans vs. United States, 10 Peters, U. S. R., 717 & 718; Godfry vs. City of Alton, 12 Ill., R. 36 & 37; Houck on Rivers, sec. 248.)

(Given as modified.)

6th. All title to land in this State must be first derived or sanctioned by the Government of the United States; and after the Government of the United States has granted or confirmed to persons land fronting on the Mississippi River, all subsequent grants or confirmations to other persons of lands made by accretions on the river front of such lands so patented or confirmed, are absolutely null and void. And if the jury believe from the evidence in this case that the lands sued for in this case are lands made by accretions in the Mississippi River, and are attached by accretion to lands granted or confirmed by the United States before the plaintiff in this suit procured any right thereto from the United States or the State, then the jury must find for the defendant. (Houck on Rivers, sec. 162.)

(Given as modified.)

Upon the return of the verdict for plaintiff, defendants moved for a new trial, because the verdict was contrary to the evidence and the instructions of the court, and contrary to law, which motion was
65 overruled by the court, pro forma, to which decision of the court the defendants at the time excepted, and pray that this their bill of exceptions may be signed, sealed, and made a part of the record, which is done.

J. GILLESPIE, *Judge.* [SEAL.]

Be it remembered that on the 8th day of November, A. D. 1871, the following appeal-bond was filed, to wit:

Know all men by these presents that we, John B. Lovingston and the Wiggins Ferry Company, and Vital Jarrot as security, of the county of St. Clair and State of Illinois, are held and firmly bound unto the county of St. Clair in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. In testimony whereof the said Wiggins Ferry Company has caused these presents to be signed by its president, and attested by its secretary, and the corporate seal of said company to be hereunto affixed, and the said John B. Lovingston and have hereunto

set their hands and seals this fourth day of November, in the year of our Lord one thousand eight hundred and seventy-one.

The condition of the above obligation is such, that whereas the said county of St. Clair did, on the third day of November, A. D. 1871, at a term of the circuit court then being holden within and for the county of St. Clair and State of Illinois, obtain a judgment against the above-bounden John B. Lovingston and The Wiggins Ferry Company, in an action of ejectment for certain lands described in the declaration in said case, and costs of suit, from which judgment the said John B. Lovingston and the Wiggins Ferry Company have prayed for and obtained an appeal to the supreme court of said State:

Now, if the said John B. Lovingston and The Wiggins Ferry Company shall duly prosecute said appeal, and shall, moreover, pay the amount of the said judgment, costs, interest, and damages ren-
66 dered and to be rendered against them in case said judgment shall be affirmed in said supreme court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE WIGGINS FERRY COMP'Y,
By JA'S J. SCANLAN, *President.*
JNO. B. LOVINGSTON. [SEAL.]
VITAL JARROT. [SEAL.]

Attest:
[SEAL.] HENRY L. CLARK, *Sec'y.*

The written bond security approved by me this 8th day of November, 1871.

J. GILLESPIE,
Judge 24th Jud. Cir., Ill's.

STATE OF ILLINOIS, *St. Clair County, ss:*

I, George M. Roeder, clerk of the circuit court in and for said county of St. Clair and State of Illinois, do hereby certify the foregoing to be a true and correct copy of the declaration, plea, the order of court, bill of exceptions, and the appeal-bond in a certain cause lately pending in said court, on the law side thereof, wherein The County of St. Clair is plaintiff and John B. Lovingston and the Wiggins Ferry Company are defendants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at office in Belleville, Illinois, this 23rd day of December, A. D. one thousand eight hundred and seventy-one.

[SEAL.] GEO. M. ROEDER, *Clerk.*

[U. S. 5-c. in. revenue. G. M. R. Dec. 23, 1871.]

Fees: $25.00 for transcript; 20.00 for plats—total, $45.00. Paid by the Wiggins Ferry Company.

67 *Assignment of errors.*

In the supreme court, of the June term, A. D. 1872.

STATE OF ILLINOIS,
Southern Grand Division, ss:

JOHN B. LOVINGSTON AND THE WIGGINS Ferry Company, appellants,
vs.
THE COUNTY OF ST. CLAIR, APPELLEE.
} Appeal from St. Clair.

And now comes John B. Lovingston and The Wiggins Ferry Company,

appellants, by W'm H. Underwood and Davis & Thomas, their attorneys, and say that in the record and proceelings aforesaid their is manifest error, in this, to wit:

The court erred in refusing to grant appellants a new trial; wherefore the appellants pray that said judgment may be reversed, &c.

By W'M H. UNDERWOOD AND
DAVIS & THOMAS,
Att'ys for Appellants.

Joinder in error.

KOERNER & HOUCK,
For Appellee.

68 At a supreme court of the State of Illinois, began and held at M't Vernon, within and for the southern grand division of said State, on Tuesday, the 4th day of June, A. D. 1872, to wit, on Thursday, June the 6th, A. D. 1872:

Present, the honorable Charles B. Lawrence, chief justice; Pinkney H. Walker, Sidney Breese, Anthony Thornton, Benjamin R. Sheldon, William K. McAllister, associate justices; Joseph B. Goodrich, sheriff; Robert A. D. Wilbanks, clerk.

Court met pursuant to adjournment. Opened by usual proclamation.

WIGGINS FERRY COMPANY ET AL.
vs.
THE COUNTY OF S'T CLAIR. } 35.

On this day comes the said appellants, by Hon. W'm H. Underwood, their attorney, and on their behalf submits this cause to the court on record, abstracts, and briefs filed.

Also comes the said appellee, by its attorney, and submits said cause upon briefs to be filed within the rule, and the court not being fully advised, take time to consider.

69 At a supreme court begun and held at Mount Vernon, on Tuesday, the fourth day of June, in the year of our Lord one thousand eight hundred and seventy-two, within and for the southern grand division of the State of Illinois:

Present, Charles B. Lawrence, chief justice; Pinkney H. Walker, Sidney Breese, Anthony Thornton, John M. Scott, Benj. R. Sheldon, W'm K. McAllister, associate justices.

SATURDAY, 15*th June*, A. D. 1872.

JOHN B. LOVINGSTON AND THE WIGGINS FERRY Company, appellants,
vs.
THE COUNTY OF ST. CLAIR, APPELLEE. } 35. Appeal from St. Clair.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error; therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the judgment of the circuit court in this behalf rendered be

reversed, annulled, set aside, and wholly for nothing esteemed,
70 and that this cause be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain. And it is further considered by the court that the said appellants recover of and from the said appellee costs by them in this behalf expended, and that they have execution therefor.

STATE OF ILLINOIS, *ss:*

I, R. A. D. Wilbanks, clerk of the supreme court of the State of Illinois, within and for the southern grand division of said State, do hereby certify the foregoing to be true, complete, and perfect copies of the record of the circuit court as filed in my office, and of the orders of the supreme court of said State, as the same appears of record in my office in the foregoing-styled cause.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Mount Vernon, this 30th day of May, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] R. A. D. WILBANKS,
Clerk of the Supreme Court.

71 In the supreme court of Illinois, southern grand division, June term, 1872.

JOHN B. LOVINGSTON AND THE WIGGINS Ferry Company
vs.
THE COUNTY OF ST. CLAIR. } Appeal from St. Clair.

Be it remembered, and it is hereby certified, that on the hearing of the above-entitled cause before the supreme court of Illinois, the appellee, the county of St. Clair, claimed the land in question under and by virtue of an act of Congress entitled an act to confirm certain lands in Illinois, approved July 15th, 1870, and an act amendatory thereto approved February 18, 1871, and did rely on said acts as source of title to the said lands; that the validity of said title under said acts was drawn in question by the appellants, Lovingston & The Wiggins Ferry Company, and that this court decided in favor of said appellants, and that the said acts conveyed no title to the said county of St. Clair as to the said lands in question; that this decision was on the merits of the case, and, if not reversed by the Supreme Court of the United
72 States, does finally settle the title to the said lands, as to the said county of St. Clair, and is therefore a final decision as to the merits of the case, and establishes the invalidity of the title claimed under said acts as to any lands purporting to be conveyed thereby to the said county of St. Clair against the title claimed by the Wiggins Ferry Company and Livingston under a prior grant.

C. B. LAWRENCE,
Chief Justice of Supreme Court of Illinois.

73 Writ of error allowed, & the clerk of the supreme court will issue writ of error & citation in conformity with law.

DAVID DAVIS,
Asso. Jus. S. C. of U. S., & presiding in 7th Circuit.

74 Opinion of the supreme court of the State of Illinois, at a term thereof begun and held at Mt. Vernon, on Tuesday, the fourth

day of June, in the year of our Lord one thousand eight hundred and seventy-two, within and for the southern grand division of said State.

Present, Charles B. Lawrence, chief justice; Pinkney H. Walker, associate justice; Sidney Breese, associate justice; Anthony Thornton, associate justice; John M. Scott, associate justice; Benjamin R. Sheldon, associate justice; William K. McAllister, associate justice.

LIVINGSTON AND WIGGINS FERRY CO.
vs.
THE COUNTY OF ST. CLAIR.

Opinion by Mr. Justice Thornton.

If the land of the riparian proprietor was bounded by the Mississippi, his right to the possession and enjoyment of the alluvion is not affected, whether the stream be navigable or not. By the common law, alluvion is the addition made to land by the washing of the sea, a navigable river, or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time.

The navigability of the stream, as the term is used at common law, has no applicability to this case. If commerce had been obstructed, or the public easement interrupted, or a question was to arise as to the ownership of the bed of the stream, then the enquiry as to
75 whether the stream was navigable or not, in the sense of the common law, might be pertinent. No such question is presented. On this branch of the case the only question is, have the United States, or the State, or the riparian owner the right to the accretion?

If the river is the boundary, the alluvion, as fast as it forms, becomes the property of the owner of the adjacent land to which it is attached. On a great public highway, like the Mississippi, floating an immense commerce and bearing it to every part of the globe, purchasers must have obtained lands for the beneficial use of the river, as well as for the land. Can it be presumed that the United States would make grants of lands bordering upon this river, with its turbulent current, and subject to constant change in its banks, by alluvion upon the one side and avulsion upon the other, and then claim all accretion formed by the gradual deposition of sand and soil, and deprive the grantee of his river front? If he should lose his entire grant by the washing of the river he must bear the loss, and he should be permitted to enjoy any gain which the ever-varying channel may bring to him. If a great government were to undertake, under such circumstances, to dispossess its grantee of his river front, the attempt would be akin to fraud, and it would lose the respect to which beneficent laws and the protection of the citizens would entitle it.

We then assume that the act of Congress of 1796, (1 Stat., 468, sec. 9,) which declares all navigable rivers, in a certain district, public highways, has no bearing upon the questions to be considered. The riparian owner has a right to the alluvion, whether the stream be navigable or unnavigable.

Blackstone says (2 book, 262) as to lands gained from the sea by alluvion, where the gain is by little and little, by small and imperceptible degrees, it shall go to the owners of the land adjoining. "For de minimis non cervat lex; and besides, these owners being often losers by
76 the breaking in of the sea, or at charges to keep it out, this

possible gain is therefore a reciprocal consideration for such possible charge or loss."

The same reasoning applies, with all its force, to the lands abutting upon the Mississippi River.

In Middleton vs. Pritchard, 3 Scam., 510, this court said: All alluvions belong to the riparian proprietor, both by the common and civil law.

In the case of the King vs. Lord Yarborough, 3 Barn., and Cress., 91, land gained from the sea by alluvion, or projection of extraneous matter whereby the sea was excluded and prevented from overflowing it, was adjudged to be parcel of the demesne lands of the adjacent manor.

This question has been discussed with profound research and great ability by the courts in Louisianna as to accretions upon this same river, and the law clearly announced. In Municipality No. 2 vs. Orleans Cotton Press, 18 Louisianna, 122, it was declared that the right to future alluvial formations was a right inherent in the property, an essential attribute of it, the result of natural law, in consequence of the local situation of the land; that cities, as well as individuals, had the right to acquire it pene alluvionis as riparian proprietor; and that the right was founded in justice, both on account of the risks to which the land was exposed, and the burden of protecting the estate. The court further assimilated the right to the right of the owners of land to the fruits of a tree growing thereon, and said, "Such an attempt to transfer from the owner of the land to the city the future increase of alluvion would be as legally absurd as if the legislature had declared that after the incorporation of the city the fruits of all the orange-trees within its limits should belong thereafter to the city, and not to the owners of the orchards and gardens."

The same principle was declared in Banks vs. Ogden, 2 Wal., U. S. 57, as applicable to Lake Michigan.

77 See also The Mayor &c., of New Orleans, vs. The United States, 10 Peters, 662; Jones vs. Loulard, 24 How., U. S., 41.

The same doctrine is fully declared in a recent case—Warren vs. Chambers, 25 Ark., 120.

To determine the title to the accretion we must ascertain the locality of the land of the adjacent owner. We need not enter upon a discussion of the laws of Congress and of the State, by virtue of which the county claims title, if the land previously granted by the United States was bounded by the river, and the accretion is attached to it.

Hilgard, the surveyor, testified that the accretion was all west of the Condaine tract. The only portion of the field-notes we desire to call attention to is the following: "To a post on the westerly side of the river L' Abbe, or Cahokia Creek; thence down the river or creek with the different courses thereof," and "thence N. 85 deg. W. 174 poles to a post on the bank of the Mississippi River, from which thence N. 5 deg. E. up the Mississippi River, and bounding therewith, (passing the southwesterly corner of Nicholas Jarrot's survey, No. 579, claim No. 99, at 6 poles,) 551 poles and 10 links to a post northwesterly, corner of Nicholas Jarrot's survey, No. , claim No. 100." This survey was made in 1815. From the copy of the plat of it from the custodian of the United States surveys it will be seen that the line along Cahokia Creek meanders with the stream, which was sinuous, and hence the call in the notes "down the said creek with the different courses thereof." A further examination of the plat will show that, though the line from "a post on

the bank of the Mississippi River to a post northwesterly, corner of Nicholas Jarrot's survey, claim No. 100," is a straight line, the river bank as indicated by the plat was also straight in 1815. The Condaine survey embraces three militia claims which had been surveyed before and which were confirmed to Jarrot.

78 One of the Jarrot surveys begins on the bank of the Mississippi, and thence to a point in the river, &c.

The defendant traced title from patents confirmatory of these several surveys, and they also proved title to "Bloody Island," which, when surveyed in 1824, was three-fourths of a mile north of the tract in controversy.

In behalf of the county it is assumed that the patent to survey 579 contains no indication that the river is the boundary; that the west line of the Condaine claim, being the line next to the river, is identical with the west line of the militia claims; that Condaine took no portion of the militia claims, but only the fractions east of them, and between them and Cahokia Creek; that the lands granted were bounded by specific lines and not by the river; and therefore the grants are limited grants, and the land in dispute is outside of their boundary-lines.

Concede that the Jarrot survey did not make the river the boundary by specific call, yet its beginning was on the bank of the river opposite St. Louis, and thence it followed the river to a point in it. Hilgard testified that this survey was on the old bank of the river. It is then evident that at this time, which was some years prior to the Condaine survey, there was no land between the western line of the Jarrot survey and the river. All the plats introduced in evidence show that the river bank was straight, and the point in the river must have been made for the purpose of obtaining the bearing of the witness-tree, a sycamore, 250 links from the point. It is manifest that the river was the boundary, and whether the grant was bounded by the river or on the river can make no difference as to the question involved. The grant may be so limited as not to carry it to the middle of the river, and yet not exclude the right to the alluvion.

A large number of cases have been cited, by one of the counsel for the county, to establish that a grant is not carried to the center

79 of a stream, but stops at the bank if the grantor describes the line as upon the margin, or at the edge or shore, and that these terms become monuments, and that they indicate an intention to stop at the edge or margin of the river. This may be good law and not affect the rights of the defendants. They do not claim the bed of the stream, and the proof shows that the river does not run over the land in dispute at ordinary stages of water. Their claim, if established, does not obstruct the river, or interfere with its free navigation and use by the public.

But the Condaine survey not only covers the Jarrot surveys, but extends beyond them. It not only takes any fractions between the Jarrot surveys and Cahokia Creek, but the land, if any, between their western line and the river. The Condaine survey run up the river and binding and passed the southwesterly corner of the Jarrot survey, No. 579, at six poles. Language could not make it more plain that the western line was bounded by the river, and the plats confirm this view.

The only construction to be given to these grants is, that the United States had conveyed the land to the bank of the Mississippi. It follows that the grantees were riparian proprietors, and are the owners of the alluvial formations attached to their lands.

Unless such construction be given and adhered to rigidly, almost

endless litigation must ensue from the frequent changes in the current of the Mississippi, and the continued deposits upon one or the other of its banks; the value of land upon its borders would depreciate; and the prosperity of its beautiful towns and cities would be seriously impaired.

Counsel say at the time the locations were made there was no advantage of river front, no wharfage and no wood-yards. This may be true, but even at this early period the grantees must have realized the vast importance of the Mississippi to them, and to all the people of the States bordering upon it, in the grand future, soon to be unfolded. They must have seen the necessity and accepted the grants for the purpose of securing an approach to the river.

80 From the proof, before 1819 a ferry was established across the river near to the land in dispute, and has been since in constant operation. Before the grant of the swamp and overflowed lands to the State in 1850, a city had sprung up on the Missouri side of the river, and a prosperous village was growing on the Illinois shore. Before the survey by the county of the swamp-lands in 1852, a charter for a railroad had been granted by the State, which resulted in the construction of a road from Terre Haute, in the State of Indiana, to Illinois town. Prior to the grant made by the United States in 1870, as shown by the plat offered in evidence, a number of railroad tracks had been constructed upon the ground formed by accretion, and an elevator erected, and dykes for the use of wagons, and a large expenditure of money made by the ferry company for the preservation of the banks, recently made.

It needed no prophetic eye to foresee, prior to the year 1850, these grand improvements which bring the products of an empire to the Father of Waters. Their absolute necessity, and consequent construction, as an outlet for our immense produce had been known for more than a quarter of a century before their completion. Their usefulness would be greatly crippled, and the public thereby seriously suffer, if ready access to the river was denied.

It would be a strained construction to hold that in making these grants the United States reserved all accretions, and thus to deprive these proprietors of ferry privileges and the beneficial enjoyment of the river.

It is further contended that the lands are not accretions, as they were made by artificial and not natural means. It is not at all certain from the proof that the accretions were entirely the result of artificial

81 structures, or that they would not have been formed without them.

The construction of coal dykes facilitated the formation, and the soil was prevented from washing away by the expenditure of money by the ferry company.

Jonathan Moore, who had known the river since 1813, testified that the accretions had commenced to form before the construction of the dykes, and McClintock and Jarrot testified to the same effect.

Concede, however, that the dykes to some extent caused the accretions. They were not constructed for such purpose; and appellants had nothing to do with their erection. They were built for the accom'odation of the public and to secure an approach to the ferry-boats; and the city of St. Louis did some work to preserve its harbor. Improvements were also made by the United States to throw the channel of the river towards the city.

The fact that the labor of other persons changed the current of the river, and caused the deposit of alluvion upon the land of appellants, cannot deprive them of a right to the newly-made soil.

Chancellor Kent, after declaring the common-law doctrine that grants

of land bounded on the margins of rivers carry the exclusive right of the grantee to the center of the stream unless there is a clear intention to stop at the edge, says: "The proprietors of the adjoining banks have the right to use the land and water of the river as regards the public in any way not inconsistent with the easement; and neither the state nor any other individual has the right to divert the stream and render it less useful to the owners of the soil." (3 vol. Com., 427.)

82 If portions of soil were added to real estate already possessed by gradual deposition through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to the addition. Upon no principle of reason or justice should he be deprived of accretions forced upon him by the labor of another without his consent or connivance, and thus cut off from the benefits of his original proprietorship. If neither the State nor any other individual can divert the water from him, artificial structures which cause deposits between the old and new banks should not divest him of the use of the water, otherwise ferry and wharf privileges might be utterly destroyed, and towns and cities built with sole reference to the use and enjoyment of the river might be entirely separated from it.

In Godfrey vs. The City of Alton, 12 Ill., 29, the public landing had been enlarged and extended into the river, both by natural and artificial means, and this court held that the accretions attached to and formed a part of the landing.

In New Orleans vs. The United States, 10 Peters, 662, the quay had been enlarged by levees constructed by the city, to prevent the inundation of the water, and the court held that this did not impair the rights of the city to the quay.

In Jones vs. Loulard, supra, the intervening channel between the island and the Missouri shore had been filled up in consequence of dykes constructed by the city, and the riparion owner succeeded.

In the case at bar the accretions have not been sudden, but gradual, as we gather from the testimony. The city of St. Louis, to preserve its harbor and to prevent the channel from leaving the Missouri shore, threw rock into the river, and the coal-dykes were made to

83 afford access to boats engaged in carrying across the river. The ferry company protected such accretions by an expenditure of labor and money.

The accretions, then, are partly the result of natural causes, and structures and work erected and performed for the good of the public. Appellants should not thereby lose their frontage on the river, and be debarred of valuable rights heretofore enjoyed. This would be a grievous wrong, for which there would be no adequate redress.

The judgment of the circuit court is reversed and the cause remanded. Reversed.

I, R. A. D. Wilbanks, clerk of the supreme court of the State of Illinois, do hereby certify that the foregoing is a true copy of the opinion of the said supreme court in the above-entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Mount Vernon, this eleventh day of February, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] R. A. D. WILBANKS,
Clerk of the Supreme Court.

(Indorsed:) 35. Supreme court of the State of Illinois, southern grand division. Certified copy of opinion. Appeal from St. Clair County. Hon. Anthony Thornton, justice. Livingston and Wiggins

Ferry Co. vs. The County of St. Clair. R. A. D. Wilbanks, clerk supreme court.

84 STATE OF ILLINOIS,
St. Clair County, ss:

I, Frederick H. Pieper, being first duly sworn, depose and say that the land in question in the case of The County of St. Clair, Illinois, vs. John B. Lovingston and the Wiggins Ferry Company, and which case has been decided against said county by the supreme court of the State of Illinois, and which is about to be taken to the Supreme Court of the United States on a writ of error, is of the value of more than two thousand dollars, and the title of said land is in question between said county of St. Clair and the said Lovingston and the Wiggins Ferry Company.

F. H. PIEPER.

Subscribed and sworn to before me this 7th day of July, 1873.
[SEAL.] SEBASTIAN FRETSAM,
County Clerk.

(Indorsed:) Affidavit of value of land.

85 Supreme Court of the United States.—October term, 1873.

COUNTY OF ST. CLAIR, PL'T'FF IN ERROR, *vs.* LOVINGSTON & AL., DEFENDANTS IN ERROR. } Error to supreme court of Illinois.

And now comes the county of St. Clair, by G. Koerner & Louis Hauck, its attorneys, and says there is manifest error in the record & proceedings in the above case, in this:

1. That the supreme court of the State of Illinois reversed the judgment of the court below.

2. That the said supreme court decided against the grant made by the United States of the lands in question to the said plaintiff in error, the said grant being made by an act of Congress.

3. That the said supreme court decided that the defendants, as owners of certain militia claims, each, by law, containing one hundred acres, and which claims were actually surveyed and bounded by well-ascertained lines, were entitled to the accretions made thereon on the Mississippi River, which are some of the lands granted by the U. S. to pl'ff in error.

4. That the said supreme court decided against said grant to the said county of St. Clair, in holding that a certain tract of land heretofore patented by the United States as an island and as fractional sections under the United States survey were entitled to accretions, not on the river front and towards the river, but to accretions above and below, or on the foot and the head of the said island, thereby annulling the grant made by the United States to the plaintiff in error below & above said island.

Wherefore the said plaintiff in error prays this court to reverse the said judgment of the supreme court of Illinois.

GUSTAVUS KOERNER,
LOUIS HOUKS,
Attorneys for Pl'ff in Error.

(Indorsement on cover:) No. 463. The County of St. Clair, plaintiff in error, vs. John B. Lovingston and The Wiggins Ferry Company. Illinois sup. court. Filed August 8th, 1873.

Supreme Court of the United States,

OCTOBER TERM 1873.

THE COUNTY OF ST. CLAIR, *Plaintiff in error*,

vs.

JOHN B. LOVINGSTON, et al., *Defendants in error*.

ERROR TO SUPREME COURT OF ILLINOIS.

Abstract, Brief and Argument

OF

GUSTAVUS KOERNER,

FOR

Plaintiff in error.

BELLLEVILE, ILL.

"STERN DES WESTENS" STEAM PRINTING ESTABLISHMENT.

1873.

Supreme Court of the United States.

OCTOBER TERM 1873.

THE COUNTY OF ST. CLAIR, *Plaintiff in error,*

vs.

JOHN B. LOVINGSTON AND WIGGINS FERRY COMPANY,
Defendants in error.

WRIT OF ERROR TO SUPREME COURT OF ILLINOIS.

STATEMENT OF THE CASE.

Action of Ejectment by *County of St. Clair* originally brought in the Circuit Court of St. Clair County *vs.* defendants in error for the recovery of a tract of land, bounded on the north by the southern line of the First Ferry Division of the City of East St. Louis, as laid out on plat of the First Ferry Division, recorded in the books of record of said County of St. Clair; on the east by the west line of survey No. 579; on the west by low water mark of the Mississippi River, and on the south by the south line of said survey No. 579, extended to low water mark of the Mississippi River. Trial by Jury. Verdict for plaintiff at the October Term 1871. Appeal taken by defendants. Case reversed by the Supreme Court of

asons appearing in the opinion of said
h the record here.

sued for was claimed as *accretions* by the
Company, and Lovingston was its lessee.

tiff claims the fee simple title to the said
t of Congress, entitled "*An act to confirm*
lands in Illinois," of July 15, 1870. U. S.
ge V. 16, 364, which act is amended by an
, approved February 18, 1871. U.S. Statutes
, Page 27.

so introduced an act of Congress, entitled
ble the State of Arkansas and other States
Swamp Lands within their limits," ap-
ber 28, 1850. U. S. Statutes at large, V. 9
an Act of the Legislature of Illinois, in
mp Lands, passed June 22, 1852, by the
which, it is provided as follows: "*All the*
verflowed lands granted to the State of
Act of Congress, entitled "An Act to en-
of Arkansas and other States to reclaim
ls within their limits," approved Sept. 28,
y granted to the Counties respectively in
may lie, &c., &c."

f March 4, 1854, Session Laws. P. 19, the
which provides as follows: "*And all the*
erflowed lands granted to the State of
Act of Congress aforesaid are hereby
vested in the several Counties in which
d."

Also Special Act of February 12, 1853, Se
P. 223, which provides as follows: "*That al*
title and interest or claim of the State of Illino
by virtue of an Act of Congress, entitled "An
able the State of Arkansas, &c., &c.," in an
lands in the Mississippi River within the li
Clair County, are hereby transferred and s
conveyed to said County."

Also an Act of the Legislature of Illinoi
"*An Act for the sale of swamp lands,*"
February 18, 1859, which allows the Counties
swamp lands.

Also an Act of the Legislature of Illinc
March 11, 1869, Sec. Sess. Laws, P. 243, entitle
to amend an Act for the sale of swamp lands,
February 19, 1859, and which reads as follow

"SECT. 1. Be it enacted &c. &c. That not
first section of the Act, to which this is an a
contained, shall authorize the County Court
County to sell, grant, convey and dispose of a
lands lying outside of the lines of the United
vey situate in said County, but the County Co
by authorized to lease all or any lands so
such time or times as the Court of said County
right and proper: Provided that no lease sh
longer term than ninety-nine years. Provid
that nothing herein contained shall render vo
veyance beretofore made by said County, bu
veyances are hereby expressly confirmed, a
thing herein contained shall apply or extend t

Illinois for reasons appearing in the opinion of said Court filed with the record here.

The land sued for was claimed as *accretions* by the Wiggins Ferry Company, and Lovingston was its lessee.

The plaintiff claims the fee simple title to the said lands by an act of Congress, entitled "*An act to confirm title to certain lands in Illinois*," of July 15, 1870. U. S. Statutes at large V. 16, 364, which act is amended by an act of Congress, approved February 18, 1871. U.S. Statutes of that Session, Page 27.

Plaintiff also introduced an act of Congress, entitled "*An Act to enable the State of Arkansas and other States to reclaim the Swamp Lands within their limits*," approved September 28, 1850. U. S. Statutes at large, V. 9 P. 519. Also an Act of the Legislature of Illinois, in relation to Swamp Lands, passed June 22, 1852, by the 1st section of which, it is provided as follows: "*All the swamp and owerflowed lands granted to the State of Illinois by the Act of Congress, entitled "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved Sept. 28, 1850, are hereby granted to the Counties respectively in which the same may lie, &c., &c.*"

Also Act of March 4, 1854, Session Laws. P. 19, the 13th section of which provides as follows: "*And all the swamp and overflowed lands granted to the State of Illinois by the Act of Congress aforesaid are hereby granted to and vested in the several Counties in which they are situated.*"

Also Special Act of February 12, 1853, Session laws, P. 223, which provides as follows: "*That all the right, title and interest or claim of the State of Illinois acquired by virtue of an Act of Congress, entitled "An Act to enable the State of Arkansas, &c., &c.," in and to the Islands in the Mississippi River within the limits of St. Clair County, are hereby transferred and set over and conveyed to said County.*"

Also an Act of the Legislature of Illinois, entitled "*An Act for the sale of swamp lands,*" approved February 18, 1859, which allows the Counties to sell the swamp lands.

Also an Act of the Legislature of Illinois, passed March 11, 1869, Sec. Sess. Laws, P. 243, entitled "*An Act to amend an Act for the sale of swamp lands,*" approved February 19, 1859, and which reads as follows:

"SECT. 1. Be it enacted &c. &c. That nothing in the first section of the Act, to which this is an amendment, contained, shall authorize the County Court of St. Clair County to sell, grant, convey and dispose of any land or lands lying outside of the lines of the United States survey situate in said County, but the County Court is hereby authorized to lease all or any lands so situate for such time or times as the Court of said County may deem right and proper: Provided that no lease shall be for a longer term than ninety-nine years. Provided further that nothing herein contained shall render void any conveyance beretofore made by said County, but such conveyances are hereby expressly confirmed, and that nothing herein contained shall apply or extend to any land

or lands within the limits of the City of East St. Louis in said County."

"SECT. 2. In all judicial proceedings the certificate of the county surveyor of St. Clair County that the lands in controversy are outside of the United States Survey, shall be *prima facie* evidence that the County is entitled to the possession of the same."

The plaintiff also in order to show the character of the survey 579 introduces an Act of Congress, approved March 3d, 1791, entitled "*An Act for granting land to the inhabitants and settlers at Vincennes and the Illinois Country.*" U. S. Statutes at large. Vol. 1, P. 221.

The plaintiff proved by *Edward Rutz*, Assessor and Treasurer of the County, and formerly Deputy Surveyor thereof, that the land in question which he identified as the land sued for, and pointed out on the map in the record, as being in possession of Lovingston, is what is called washed-on land, and now a sandbar, that it has increased within the last four years; never saw it overflowed, as he never saw it when there was high water, and that it is opposite survey 579; that the old Bloody Island was way above, and that all from the west of said survey to the river has been formed, he supposes, by the washings of the river; that Bloody Island was formerly seperated by the river from the main shore, but that there is now only about forty acres of it left, and that there is no Island now.

By the County Surveyor *G. Hilgard*, that he made the map on the record as County Surveyor, and that it is correct, that he ran the lines of the surveyed tracts ac-

cording the United States field notes. That he surveyed the accretions, and what is not yellow colored on the map, was never surveyed by the United States. That Bloody Island was surveyed by the United States in 1824, and according to that survey was about 3-4 of a mile north of the tract in question. That as regards survey 579 on the old bank of the river, there was a line run by the United States, according to the field notes. They correspond with his notes on this map; the Mississippi River is not given as a boundary on the plat. The United States notes are as follows:

"Surveyed for Nicholas Jarrot, who claims in right of Jean Dumochelle *100 acres of land*, beginning *on the bank* of the Mississippi River, opposite St. Louis, from which the lower window of the United States store house in St. Louis bears N. 70° West. Thence South 5° W. 160 poles to a point *in the river*, from which a sycamore 20 feet in diameter bears S. 85, E. 250 links, thence S. 85, E. 130 poles (at 30 poles a slash) to a point Thence N. 15° W. 170 poles to a forked elm on the bank of Cahokia Creek. Thence north 85°, west 70 poles to the beginning."

That the land in question was made land, and that as late as 1854 it was covered with water. The land was made by the dyke above made by the City of St. Louis, and principally by the dyke of the Pittsburg Railroad Company. Bloody Island was when surveyed about 1-4 mile above Northern Dyke and 3-4 mile north from the tract in question, and that he made the certificate on the map (to-wit that the land had not been surveyed by the United States). That between the Island as they call it that is to say the original Bloody Island and all the

accretions (see Testimony of Rutz) there is some low land, and the present bed of Cahokia Creek runs through it. In time of very low water you may cross from survey 579 to the Lovingston tract on foot. There is always a slough and running water. In high water there is no crossing except on boats. That when the River is at an ordinary stage, it is not passable on foot, and that in high water it will overflow now; that owing to some railroad structures the old river bank cannot now be well defined at all places, but a little further down and below the Round house of the Belleville Railroad the old bank can be defined. That the improvements of the Wiggins Ferry Company protect the lands of the old Island. That what is called the Coudaire Tract or survey 786 includes surveys 579, 624 and 766, and the fractions *on the east* of those surveys to the Cahokia Creek. The Coudaire tract makes the river the boundary, but at the same time it commences at the corners of the former surveys. It commences at survey 766, the upper Jarrot Tract, and then runs along including *the* fractions (spoken of before by Mr. Hilgard as being east of the Militia Surveys and between them and the Cahokia River) to the south-west, and includes the entire tract below, Survey 579 (the Jarrot Tract) and then *says passing N. Jarrots Corner* so many rods, leaving the other parts undisturbed. It says binding the river, but at the same time it makes this corner which the old survey makes in the river. That there was when the three Militia tracts were first surveyed some tracts left between them and the Cahokia Creek. Somebody (Coudaire) went and got another survey (the Coudaire survey) including those three surveys and taking in those fractions and at the same time running below this survey (the

lower Jarrot survey 579) and taking in a
stating in the field notes as so many rods
corner (the one *in* the River) so it strikes this
wherever the other corners were made; th
line of the Coudaire Tract is the River ba
used to be the River front, when those survey
surveyed. The land in question is all west
daire Tract."

That the line of the Coudaire Tract is the line of 579 (the lower Jarrot or Dumoc
west of which the County of St. Clair claim
those other lines were run first, and the notes daire Claim made the same corners.

By *Jonathan Moore.* That the dyke (uppe
by the City of St. Louis. In 1852 he survey
south of Bloody Island, on appointment by
the State, returned it as Swamp land. Before
was made there was a good deal of the River o
Before dyke was made the River was coming
of the Island, and would have come, as he su
for the labor that was done to prevent it. T
being on this side the land would not have fo

That he never surveyed the Coudaire Tr
know what the words "up the river and bin
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would run to the corner of the Nicolas Jar
That where the line runs from a point from on
another, we run from one point to another, b
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the quantity where the River makes a line,

accretions (see Testimony of Rutz) there is some low land, and the present bed of Cahokia Creek runs through it. In time of very low water you may cross from survey 579 to the Lovingston tract on foot. There is always a slough and running water. In high water there is no crossing except on boats. That when the River is at an ordinary stage, it is not passable on foot, and that in high water it will overflow now; that owing to some railroad structures the old river bank cannot now be well defined at all places, but a little further down and below the Round house of the Belleville Railroad the old bank can be defined. That the improvements of the Wiggins Ferry Company protect the lands of the old Island. That what is called the Coudaire Tract or survey 786 includes surveys 579, 624 and 766, and the fractions *on the east* of those surveys to the Cahokia Creek. The Coudaire tract makes the river the boundary, but at the same time it commences at the corners of the former surveys. It commences at survey 766, the upper Jarrot Tract, and then runs along including *the* fractions (spoken of before by Mr. Hilgard as being east of the Militia Surveys and between them and the Cahokia River) to the south-west, and includes the entire tract below, Survey 579 (the Jarrot Tract) and then *says passing N. Jarrots Corner* so many rods, leaving the other parts undisturbed. It says binding the river, but at the same time it makes this corner which the old survey makes in the river. That there was when the three Militia tracts were first surveyed some tracts left between them and the Cahokia Creek. Somebody (Coudaire) went and got another survey (the Coudaire survey) including those three surveys and taking in those fractions and at the same time running below this survey (the

lower Jarrot survey 579) and taking in another part, stating in the field notes as so many rods passing this corner (the one *in* the River) so it strikes this corner, and wherever the other corners were made; that the west line of the Coudaire Tract is the River bank, or what used to be the River front, when those surveys were first surveyed. The land in question is all west of the Coudaire Tract." 10

That the line of the Coudaire Tract is the same as the line of 579 (the lower Jarrot or Dumochelle Tract, west of which the County of St. Clair claims), *because those other lines were run first, and the notes of the Coudaire Claim made the same corners.* 10

By *Jonathan Moore.* That the dyke (upper) was built by the City of St. Louis. In 1852 he surveyed the land south of Bloody Island, on appointment by Governor of the State, returned it as Swamp land. Before that dyke was made there was a good deal of the River on this side. Before dyke was made the River was coming on this side of the Island, and would have come, as he supposes, but for the labor that was done to prevent it. The current being on this side the land would not have formed at all. 11

That he never surveyed the Coudaire Tract. Don't know what the words "up the river and binding therewith" mean, would understand if he saw the notes. He would run to the corner of the Nicolas Jarrot survey. That where the line runs from a point from one corner to another, we run from one point to another, but that the Surveyors follow the notes from one point to another; that he could not say whether the lines were run along the river merely to ascertain the quantity or not; if they get the quantity where the River makes a line, they have

to meander the River, and it is done often, but if the line is straight we run from one point to the other.

By A. G. Moore, who says that he is a Surveyor, surveyed Bloody Island, or what is termed (officially) Island No. 3. This Island never reached south of the section line between 11 and 14 (see map) of Island No. 3. There was when he surveyd the land for swamp land hardly 20 acres (of Bloody Island). Reached the Island (1852) in a skiff. All below was water to the eastern bank of the River. Those bars that have formed in front of the eastern shore have all been formed since. It was the making of the dyke that made this land. The channel (in 1852) was all on this side of the Island or very near it, the whole of the ice came down there, that where they crossed the River between the Illinois shore and Bloody Island, the channel was 11 chains and 20 links wide.

By Wm. McClintock. When he first knew that part of the Country, 1819, the main channel of the Mississippi River was in ordinary stages of the water this side of the Island. In passing I saw the forming of sand bars below the Island. There was water where the present bank is till the dyke was made. Those bars, south of Bloody Island, were made by washing of the bank there (of Bloody Island), after the dyke was made and the River thrown to wash away Duncan's Island on the other side; that that was the cause to give a harbor to St. Louis, and the River left this side from the fact that there was an eddy formed in the water, and the rise of the water bringing the sand in that eddy, it sunk there and formed those bars that are there now; that the first accumulations were further out in the River, not adjoining the Island. That he ran

on a bar out in the River, and that he believes that was before the dyke was made. Between Bloody Island and bar spoken of there was a passway for the ferry boat and other boats to St. Louis, and that bar had no connection with the eastern shore of the Mississippi River, or Bloody Island; that was as far back as 1839—1841.

By John Thomas. That there was a bar below the Island, and a channel between the two where the boats went, and that another bar formed till the construction of the dyke filled up, and it is all connected together. Those bars were not connected with the main land, nor with Bloody Island. At low water there were separate bars, in high water they were all covered.

The defendant introduced Report of Michel Jones, 2. V. American State Papers Public Lands, P. 615.

Also Act of Congress, April 16, 1814.

Vol. 3 U. S. Statutes at large, P. 125, 126. Act of Congress, April 16, 1814, V. 3 Statutes at large, P. 125, confirming said Report and the Coudaire Claim, also certified plat and field notes of certain surveys made in January, 1815 (which are copied in the record), also Patent to Coudaire (copied in the Record), and which reserves all the title of owners of the Militia Claims, viz: the two Jarrot and the Piggot surveys, numbered *529*, 624 and 766; also Patent to Jarrot, and then connected the Wiggins Ferry Company by conveyances with the Patents, and proved by Col. Jarrot that he knows the land in controversy, and that there is a large accretion formed there; before they were formed the west bank of those surveys had been washed off by the Mississippi. These accretions when they commenced forming he can

not say, but there were various changes in the River at different times. That at one time it was a mooted question where the main channel was whether on the east or west side of Bloody Island; but boats continually plied on the west side, and occasionally they passed up and down on the east side, on business, not as a channel. The Island (Bloody Island) had a tendency to wash away at the head of the Island and to form on the foot of it; and that before dyke was built there were frequently large sand bars at the east and south of the Island. From 1851 the Island kept filling up at the east side, the first thing that protected the Island on the west side from washing away was the stone-break-water, put there by the U. S. Government above the Island and on it, the next was the rivetting of the shore (on the west side of the Island) by the Ferry Company, lining the west side with stone. That the Island forms now a continuous bar down to the Pittsburgh Coal Dyke. There is no water there now separating the bar from the main land, except in part a pond caused by the Cohokia Creek being dammed up.

The first formations he noticed in front of those old surveys were formed south and east of Bloody Island joining it. Not all of this within the green lines before it was filled up was the Mississippi River. As late as 1854 no boats could run here; that perhaps the filling up was localised in a great measure by the dykes, but the filling up was going on, as the River made in next the Illinois bank the Island enlarged correspondingly; that if the dykes had not been built the River would have had all of East St. Louis before this time.

The field notes bind the Coudaire Tract by the River. There was about one hundred acres outside of those

three claims; the Coudaire Claim covers the other claims (surveys), and the notes don't regard the division; could not tell whether the western lines as indicated in the field notes of the (lower) Jarrot Tract are precisely the same as the Coudaire Tract. One says beginning at the bank of the Mississippi River, and the other begins at the corner; these don't begin at the same place, they correspond, but this begins away from the River and runs the other way. It possibly may be the same, possibly exactly; one begins at one corner and this at another, and witness after pointing out what he supposes to be some discrepancies between the different surveys, says that it seems that this upper claim and the lower one are both called Jarrot's Claims (which in fact they were), and that that makes the discrepancy there; by taking the lenght of the three claims it makes that distance right, but that they mention it on the notes as the above mentioned survey 579 would make it the lenght of these three surveys; that he does not say that the boundaries are the same, but they start the same and come out the same. In those three surveys (Militia Claims) there is nothing said about binding the River, if witness recollects right; and there might be some piece of land left between those claims and the River which the Coudaire Claim could cover. It is very possible there was. It is not likely the River was so straight that they could run each of those three tracts its whole lenght straight and follow the River, and that the River was not that straight.

THE ERRORS ASSIGNED ARE:

1st. That the Supreme Court of the State of Illinois reversed the judgment of the Court below.

2d. That the said Supreme Court decided against the grant of the land in question, made by the United States to the said County of St. Clair, by an Act of Congress.

3d. That the said Supreme Court decided, that the defendants, as owners of certain Militia Claims, each claim containing by law one hundred acres, and which claims were actually surveyed and bound by well ascertained lines, were entitled to the accretions made thereon on the Mississippi River, which are some of the lands granted by United States to plaintiff in error.

4th. That the said Supreme Court decided against said grant to the County of St. Clair, in deciding that a certain tract of land heretofore patented by the United States, as an Island and as fractional sections under the United States survey, was entitled to accretions not on the river front, and towards the river, but to accretions above and below or on the foot and head of said island, thereby annulllng the grant made by the United States to the said plaintiff in error.

BRIEF.

I.

The Law of the United States of July 15, 1870, under which the plaintiff claims, is so plain as not to admit of a misconstruction such as defendants attempt. It exempts the Cahokia Commons, to which the report of Com-

missioners of the United States Land Office refers, which is cited by defendants.

The Cahokia Commons, by ancient grant, and as shown by the plat (see State Papers Public Lands, V. II. and also report of Commissioners on said Commons), was bounded by the Mississippi River, and so known to be bounded by reputation for the last one hundred and fifty years. Hence lands formed on it may be accretions. For this very reason the Law in question expressly prevents its application to the Cahokia Commons. The point however, whether or not the land sued for is an accretion or not, is for the Courts and Juries to decide. The land in question is unsurveyed land, and in that condition granted absolutely to the County of St. Clair.

II.

The County does not claim an inch of ground within the original survey; only all the new formation west of the western line of 579, surveyed for Nicolas Jarrot, who claims in right of Jean Dumouchelle one hundred acres of land.

III.

The defendants' argument in referring to Bloody Island seems to contend that the land in question might be claimed as an accretion to said island. It is easy to dispose of this question. The testimony is clear and uncontradicted, that Bloody Island, as surveyed by the United States in 1824, and entered by S. Wiggins, was, at its most southerly point, three quarters of a mile above the northerly line of the tract in question. While the owner of an island or peninsula may claim accretions in certain

cases, on the face of the river within the lines of his land, it would be absurd to contend that he could claim accretions up and down the river and beyond his lines. Could he do so, he would at once deprive riparian owners above and below, also entitled to accretions, of their rights to claim them in front of their land. If, for instance, claim 579 belonged to another owner entitled to accretions, the latter would lose them, because the accretions on foot of the island would cut him off from the river. Now immediately below this tract 579 begin the Cahokia Commons, but the formation near the island lay right in front of it, and would interfere with the riparian rights of the commoners. As one of the witnesses states, Wiggins Ferry Company might claim down to New Orleans, perhaps, on the same principle. We merely remark, in passing, that the testimony shows that the sand bars in question formed south of the island, were disconnected from it, and only by dint of the improvements made by the City of St. Louis and the Pittsburgh Coal Company filled up, so as to form a connection with Island No. 3, which is the official denomination of Bloody Island. For a better understanding we would also here remark, that all land now west of Cahokia Creek, whether in the original surveys between said creek and the Mississippi River, or new made lands, or what is left of the old island, is now called, not Bloody Island, but "the Island," and known by that appellation alone, and where *some* of the witnesses speak of the Island, they speak of all these tracts together.

IV.

We now come to the tract in question, the Dumouchelle Tract, survey 579, to which the land claimed by

plaintiffs is said by defendant to be an accretion, and which is by the defendant called a part of the Coudaire Tract. By reference to the maps in the record it will be seen that there were three one hundred acre tracts on the bank of the Mississippi River, viz: Survey 579, Nicolas Jarrot, in right of Jean Dumouchelle; survey 624, heirs of Piggot, in right of Samuel Ware, and survey 760, Nicolas Jarrot, in right of Jos. Cuillard.

The Commissioners in the Kaskaskia Land District, under authority conferred by Act of Congress on March, 26, 1 04, entitled "*An Act making provisions for the disposal of Public Lands in Indiana Territory, &c.*," reported their decision to the Secretary of the Treasury, December 31st, 1809, and in their report were embraced the three surveys above mentioned, which they reported as to be confirmed, the same being entered by them in their report of claims within the District of Kaskaskia, founded on the act of Congress granting a donation of one hundred acres of land to each militia man enrolled and doing duty in Illinois on the 1st day of August, 1790. In their report the Commissioners described the said tracts of land of one hundred acres each, as surveyed by virtue of an order from the government, "on the banks of the Mississippi" and the Cahokia Creek—see V. II American State Papers, Public Lands, Pages 167, 168, 172, — which said decision of the said Commissioners was duly confirmed by act of Congress, May 1st, 1810, and also act of April 27, 1812.

The three patents issued for said surveys gave no description of the land, but describe them as militia claims, giving number of claim and survey, situated in township 2 north, range 10 west of the 3d principal me-

ridian. At a later period one Pierre Coudaire presented a claim for four hundred acres, as an improvement claim, reported upon by one of the Commissioners, Michael Jones, on the 18th day of January, 1813, situated in township 2 north, range 10 west of the 3rd principal meridian in Illinois, being survey 786, lying between Cahokia Creek and the Mississippi, and including the above three surveys or militia claims. V. II. American State Papers, Public Lands, page 615. The patent describes the Coudaire Tract as above excepting the said three militia claims, which are in said patent expressly reserved from the transfer by these presents, that is, the Coudaire patent. In order to understand what Coudaire really acquired, the maps must be examined. The militia claims and surveys remained undisturbed. By ancient grant, afterwards confirmed, the Common Fields of Cahokia were bounded by the River l'Abbe (Cahokia Creek). The three surveys were between said creek and the Mississippi River, but being laid out as the law required, in parallelograms, and the creek meandering, fractions were left between the eastern line of said surveys and the Cahokia Creek, containing about one hundred acres.

The evidence clearly showed that when the Coudaire Tract was surveyed, no deviation was made from the western line of the militia claims, and the copy of the original field notes, introduced by the plaintiff, of survey 579, of the land in question, does not contain the words "binding with the river," if that can mean anything at all, when exact points and distances are given, one of the points being even in the river. If the Coudaire confirmation conveys anything, it could not by any pos-

sibility convey any more than the fractions on the east, between the east line of the three militia confirmations and the Cahokia Creek, and the few rods of land extended further south of Jarrot's claim 579.

The testimony of Rutz, the County Surveyor Hilgard, Jonathan Moore, all surveyors, is conclusive on that point.

V.

We now approach the main point in this case, and to understand it properly, the nature of those militia and settlement claims must be historically referred to.

The earliest trace of donations to settlers, head rights, as they were called in the old French settlements in Illinois, we find in a resolve of the old Congress of the United States, passed June 20th, 1788, Story's U. S. Statutes, 1st volume, page 580. On page 582 a report made to Congress and approved by it, states: "That measures be immediately taken for confirming in their possessions and titles the French and Canadian inhabitants and other settlers on these lands, who, on or before the year 1783, had professed themselves citizens of the United States, or any of them, and for laying off several tracts, which they rightfully claim within the prescribed limits; and for laying off for the benefit of said inhabitants three additional tracts, adjoining the several villages of Kaskaskia, la Prairie des Rochers and Cahokia, in the form of a parallelogram, extending from the river Mississippi eastward (to the highlands), and of such extent as shall contain four hundred acres, for each of the families in said villages. The report further provides that

the Governor of the Western Territory be instructed to repair to the French settlements on the Mississippi, at and above the Kaskaskia; that he examine the titles and possessions of the settlers above described, in order to determine what quantity of land they may severally claim, which shall be laid off for them at their own expense, and that he take an account of the several heads of families living within the reserved limits, in order that he may determine the quantity of land that is to be laid off in the several parallelograms, which shall be laid off accordingly by the Geographer of the United States."

The Congress under the present Constitution passed an act, March 3, 1791—Story's Edition, Vol. II, page 231; Vol. I, United States Statutes at large, page 221— granting the heads of families four hundred acres within the same limits as in the resolve, re-enacting said resolve of June 20th, 1788, and also providing in the 6th section that the Governor of said Territory be authorized to make a grant of land, *not exceeding one hundred acres*, to each person who hath not obtained any donation, &c.. and who has done militia duty, the said land to be laid out at the expense of the grantees, in such form and place as the said Governor shall direct.

Section 8 provides that the Governor of the Northwest Territory is directed to lay out the said lands agreeably to the act of Congress of June 20th, 1788, (which provides that the said lands shall be located within certain parallelograms).

VI.

WHAT ARE ACCRETIONS.

The doctrine of accretions is found fully developed in the Roman law.

The acquisition of a thing, because it becomes connected with another thing already belonging to a person, was called by the civilians "*accessio*," of which "*alluvio*" (accretion) was only a species.

Alluvion is an accretion of a tract of land, bounded by a river, *the owner of which is not limited by a certain measure.* It does not apply to what the Romans call "*ager limitatus.*"

§ 20. *Inst. de rerum divisione et qualitate.*

Lex 7. Dig. § 3. Also Lex 12 ib.

Lex 16. *De acquirendo rerum dominio*, 41, 1.

Lex 24. Dig. § 3. *De aqua et aquae pluv. etc.*, 39, 3.

Lex 1. § 1. Dig. *De flumin.* 43, 12.

Alluvion must be gradual and imperceptible by natural causes.

§ 20. Inst. *De rerum divisione.* 2, 1.

Lex 7. § 1. Dig. *De acquirendo rerum dominio.* 41, 1.

If an island is formed between an island and the shore, it is to be divided between the owner of the island and the owner ot the shore tract, which is also the case if the river should leave its bed between the shore and and island, and in the measurement of division the rect-

angulum is to commence from the utmost boundary of the island, which is nearest the opposite shore.

Lex 56. § 1. Dig. 41, 1. *De acq. rerum dominio.*

Lex 65. § 3. Ibid.

The common law of Germany is essentially the same.

See Mittermayer Principles of the common private law of Germany, Vol. I. § 147.

The words are: "The Roman law as to the formation of islands, alluvions, &c., is applied as the common law of Germany, though there are some deviations from it by laws of particular States, which often determine islands to belong to the Sovereign."

The Code Napoleon defines alluvion as an accretion, which forms by and by and imperceptibly on land bounded by a river.

Code Civil. Titre II. § 556.

The common law as to not navigable rivers has adopted the civil law, and according to it an accretion is an addition of soil by gradual deposition, through the operation of natural causes, to the real estate already in possession of the owner.

2 Washb. on Real Property, § 551.

1. Bouvier's Law Dict. Alluvion, page 94.

3 Kent, 428.

Angel on Water-courses, § 53.

VII.

From the foregoing we deduce two points:

1st. The accretion must be produced by natural means, and not by artificial ones, particularly if such artificial ones are made by others than the riparian owner.

2d. It must be clear and apparent by the grant that the land to which an accretion is claimed was actually bounded by the river. Angel on Water-courses, as to river-boundaries, §§ 11, 15, 16, 18, 20, 23.

Now as to the first point, the evidence clearly shows that, as late as 1854 (see testimony of Hilgard, Jonathan and A. G. Moore), where this land now is, there was water. Some bars had formed out in the river south of Island No. 3, but there was a channel on this side of the island, though not the main channel. Those bars near the island, and some accretions to the island, were formed by improvements made north of the island, by the United States government throwing the river towards the City of St. Louis. The land in question was made by the dyke constructed by the City of St. Louis, about a mile above, connecting Bloody Island or Island No. 3 with the main shore on the Illinois side, and more particularly by the improvements being made and enlarged from 1852 on. The upper dyke stopped up the channel, the lower prevented the back water from forming a large arm of the river or a lake up to the upper dam. Those sand bars forming in the river, of which McClintock and Jarrot speak, would have met the island in course of time and prolonged it toward the south, but a part of the Mississippi would still have run between the island

and main bank, but for the dykes. The binding of the shore by the Wiggins Ferry Company had only the effect of keeping the land made by those two dykes. See testimony of Hilgard, the County Surveyor.

As to the second point, upon all the authorities, we insist that accretions do not enure to the owner of the bank, whose boundaries are well defined in the grant; in other words, not to an "*ager limitatus.*" We presume there is no exception to this rule existing, as we have seen, in the civil, the German, the French, and the common law of England.

The Supreme Court of Illinois has in no instance, far as it has gone to extend the rights of riparian owners, obliterated this landmark. It has taken care to refer to it in all the various decisions on the subject.

In the leading case, Middleton *vs.* Pritchard and others, 3 Scam. 510, the Court say: "Where islands are marked, mapped, platted or surveyed, or where islands are distinctly drawn on the plat as bounding the front on rivers, lakes or other waters, these distinct acts of the grantor must explain, control or determine the interpretation, construction and extent of the grant."

On page 522 in the same case the Court say: "There is no line upon the maps or plats, nor any deviation in the field notes, nor any visible monument to define and designate the southern boundary of the tract. It is sold, more or less. If there be more, the purchaser gets it; if there be less, he loses it. This (quantity) therefore cannot control."

See, also, Lafflin *vs.* City of Chicago, 49 Ill. 175 and 176. The Court say: "The title of the riparian owner extends to the middle thread of the stream, if it is called for as a boundary. In this case the United States government granted these lots, bounded by the Chicago River, and made no reservation. The plat in that case showed that the lots were bounded by the Chicago River, and the Secretary of War, in explanation of the plat said:

" "The middle of the rear of the water lots bounded on the Chicago River is determined by posts set at the intersection of the lines of the lots and streets with meanders of the river, as shown by the notes entered upon the meandered lines." "

The very object of this sale by government was to establish wharf lots — water lots, as called in said explanation, and the intention of grantor was clear, that the river should be the boundary.

We do not at all, in our theory of the case, come in conflict with the decisions heretofore made by the Supreme Court of Illinois. We argue it now upon the doctrine of that Court that, as to riparian owners, the Mississippi is not a navigable river.

VIII.

We have heretofore referred to the history of those claims; now let us make the application.

The region of country from the mouth of Wood River, a little below Alton, to the mouth of Kaskaskia River, between the bluffs on the east and the Mississippi River

on the west, is generally known as the American Bottom. It is about ninety miles long, and averages five miles in width.

At the time of the resolve of Congress, June 20, 1788, no American resided there. The principal settlements were at the Kaskaskies, Prairie des Rochers and Cahokia, the latter opposite Carondelet, and a little below St. Louis, though there were others, such as Fort Chartres, Prairie du Pont and Cantine, the latter extending nearest to Wood River. It was known that the French settlers had occupied that region under various ancient grants, and Congress, as early as 1788, also provided that such settlers, in addition to their prior possessions (provided they had declared themselves citizens of the United States), should have each family a four hundred acre tract. It was provided by Congress, in order to fill the ancient claims, and also to reserve lands for those settlement or head rights, that a sufficiency of land should be surveyed between the Mississippi River and the highlands in parallelograms, by the Geographer of the United States.

The law of 1791, above cited, re-enacted in the main this resolve, and made in addition a grant *not exceeding one hundred acres* to such settlers as might have performed militia duties, providing again for a reservation of lands for all those purposes, to be laid out as provided in said resolve. Now, we hold that these donations (which being without consideration are not to be strictly construed against the grantor) were limited to exactly the quantity fixed by the law. It would have been most unjust to give one militia man one hundred acres, and to another, by possible accretion, one thousand acres.

It is to be presumed that the surveyors, under the direction of the Governor of the Northwest Territory, carried out the directions of the law; that is, that they laid out said reservations in parallelograms. This being done, there was no possibility of making the river the boundary, except where, as in this case, as the maps show, accidentally the river bank was quite straight and fell on the western line of the parallelogram, though it was not so straight but what one of the points of the survey was fixed in the river.

Now look at the field notes of survey 579, the tract in question, given in evidence with Hilgard's map, and it will be at once apparent that the case of Middleton *vs.* Pritchard et al. does not apply. There is not a word said in said field notes about binding the river or meandering with the river; the lines are clearly and distinctly given. Jarrot says the field notes of the three militia claims do not say binding with the river. The field notes of the Coudaire Tract are equally definite, the southerly line terminating at a post on the bank of the Mississippi River, thence up the Mississippi River and binding therewith (passing the southwesterly quarter of Nicolas Jarrot's survey, No. 579), to a post northwesterly corner of Nicolas Jarrot's survey, No. ———, claim 100 (which it will be seen by the map in survey 766, claim 100,) the uppermost of the three militia tracts.

The survey was from a post on the bank by the southwest corner of survey 579, a certain distance and by a certain angle, to the southwest corner of the survey 766. (Jarrot had confirmed to him both those surveys.)

Hilgard positively swears that the west line of the Coudaire survey is identical with the west line of the three militia claims.

We hold that both those land donations, militia claims and settlement rights (Coudaire's being of the last description, but covering the three militia claims), were each "*ager limitatus*," a well defined, measured tract of land. The patent to 579 (tract in question) contains no indication that the Mississippi is the boundary.

Coudaire took nothing of these militia claims, but as explained in the testimony, only the fractions east, between the lines of the militia claims and the meanders of the Cahokia Creek. The title of defendants to the land in question ultimately rests solely on the militia claims, the Coudaire grant being, as expressed in the patent, utterly void as to them.

The militia claims, 579, 624, 766, were confirmed before the Coudaire claim was confirmed, and of course could not, by the express terms of all those confirmatory laws, interfere with the said militia claims. The Coudaire tract was confirmed as a settlement right, which was by law not to exceed 400 acres.

IX.

The defendant has cited the law of Congress of February 27th, 1815, amendatory of the law of August 16th, 1814, entitled "*An Act confirming certain claims to land in the Illinois Territory, and providing for their location.*"

By examining the acts of 1814 and 1815, referred to by defendant, it will be seen that neither has any application at all to this case.

In 1814 it had been found out that the lands reserved for the purpose of satisfying the claims of the French settlers and militia men in the American Bottom, by the act of 1791 and the resolve of 1788, were not sufficient, and so it was provided by the 3d section of the act of 1814 that another tract, beginning at the township line nearest to and above the mouth of Big Muddy River; thence east to the meridian line; thence north with said meridian line to the north boundary line of township No. 5 north; thence west to the Mississippi River; thence down the same to the beginning, shall be reserved and set apart to satisfy the unlocated claims of persons to land within the Illinois Territory, confirmed to them heretofore by this act.

The same act gives to settlers within said tract, however, a right of pre-emption.

This tract is at least one hundred miles from the French settlements spoken of in the resolve of 1788 and the law of 1791.

The act of 1815 refers, by express terms, to this tract alone, and provides that locations may be made on said tract to the middle of the river and islands.

So far from this act showing anything in favor of the position of the appellant, it is destructive of the idea that a location in the tract described in the law of 1814, made on the Mississippi River, would carry with it by riparian rights any bars or island from the shore to the

middle of the river. It considers those bars and islands as fit to be appropriated by independent claimants, not the owners of the banks, and the government thereby expressly declared itself to be owner from the bank to the middle of the river.

X.

The Coudaire field notes do not make the river the boundary as little as the patent. The western line is given by courses and distances and monuments, to-wit: the two corners of the militia claims, as established by the field notes thereof, and the words "binding the river," merely show that the said lines at this place run alongside of the river. See Jonathan Moore's testimony as to the words "binding the river."

There was no advantage of the river front when those locations were made. The country was hardly settled. St. Louis was a little village. The important point was Carandolet, on the Missouri side, six miles below. Canoes, and now and then a keel boat, were the only craft on the river. No wharfage, no wood yards were thought of.

XI.

We then resume:

1. The lands in question are not accretions, having been formed by artificial structures, not even made by appellants.

2. The land in question is outside of the boundary line of survey 579, and also of the Coudaire claim, both

tracts being bounded by specific lines and not by the river, being "*ager limitatus*" by a definite quantity and exact measurement.

XII.

Whether the river was the boundary of the tract in question or not, was one of the principal, almost the only question of fact submitted under the instructions of the Court to the Jury. The Jury found on that question for the County, and surely on sufficient evidence. There was really no contradiction in the evidence as to that point, and if there had been, the Court would not set the verdict aside unless it was flagrantly wrong. We refrain to cite authorities on that point.

XIII.

Upon the hypothesis of claiming through the State:

The act of Congress to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, grants all unsold swamp and overflowed lands unconditionally to the States. It makes no difference whether they were surveyed or not. The surveying is only part of the machinery by which the States were to have the donations defined. The State became the absolute owner of the lands, with power to dispose of them in such manner and for such purposes as to the Legislature might seem the most expedient. Board of Supervisors of Whitesides County *vs.* Burchell et al., 31 Ill. 68. They being swamp lands, the title vested in the State by the act of Congress.

Government may pass title to its property by enactment as effectually as by a patent. 34 Ill. 395, Dart et al. *vs.* Hercules.

The character of the land may be shown on the trial of a cause, by competent testimony.

These lands were conveyed to the respective parties by act of June 22d, 1852. Gross' Statutes, 1868, p. 724; also by act of March 4th, 1854. Ibid p. 731.

By a special law, February 12th, 1853, Session laws, "*All the right, title, interest or claim of the State of Illinois, acquired by virtue of an act of Congress, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28th, 1850, in and to the islands in the Mississippi River within the limits of St. Clair County, are hereby transferred, set over and conveyed to said County.*"

By act of January 29th, 1859, Gross' Statutes, p. 732, Counties are allowed to sell all or any swamp lands, &c. See act of Legislature, March 11, 1869. Session Laws, 1869, p. 243.

That last act does not refer exclusively to the lands embraced in the act of 1859, allowing counties to sell swamp lands, &c. It refers to lands outside of the United States surveys, and forbids the sale of them hereafter, but allows to lease them.

Now, if those unsurveyed lands belong to the State by any title whatever, the County is to lease them, but not to sell them, thereby vesting a limited title in the

County as to those lands, whether swamp lands or not, and entitle it to recover possession.

This law further provides that in all judicial proceedings the certificate of the County Surveyor (which was given in evidence), that the lands in controversy are outside of the United States survey, shall be *prima facie* evidence that the County is entiled to the possession of the same, thus giving a possessory right to all lands outside of the United States survey to the County.

The only instruction given for plaintiff is the undoubted law as to rivers not navigable. Jones *vs.* Soulard. 24 Howard, 47.

No exception was taken to this instruction, and none is taken now. It is admitted to be the law in defendants own instructions. The Jury found then in strict accordance with the law as laid down by the Court, and the facts as proved by the testimony. The land in question was the bed of the river before the said dykes were made, and the ownership was in the United States before they conveyed it to St. Clair County.

XIV.

We have thus far argued the Case strictly within the decisions of the Supreme Court of Illinois, which are to the effect that all grants bounded upon a river *not navigable* (to which class they decide the Mississippi River to belong), as to riparian rights, entitle the grantee to claim to the centre thread of the river and all the islands lying between the main land and the centre thread of the current.

Middleton *vs.* Pritchard, III. Scam. p. 510.

The doctrine that no rivers are navigable, except wherein ebb and tide flows, said to be the common law doctrine, but denied even in England, is repudiated by many decisions in the State Courts.

2 Binney, 475, Carson *vs.* Blaser.

14 Serg & Raw, 71, Commonwealth *vs.* Fisher.

1 Penn, 462, 467, Schmuker *vs.* Schuykill N. Co.

2 Devereux, 30, Wilson *vs.* Forbes.

1 M. Cord, 580, Cates *vs.* Wadlington.

6 Humphreys, 358, Elder *vs.* Burrus.

2 Porter, 436, Bullock *vs.* Wilson.

38 N. Y., 461, People *vs.* Canal Appraisers.

3 Clark (Iowa), p. 1, McManus *vs.* Carmichael.

In this Court decisions have been made which strongly favor the view that the navigability of the river does depend on *navigation in fact*, and not on the supposed English definition.

See also, Woolrych on Waters, p. 14.

And a very able article on Navigable Rivers in Vol. II, No. 4, p. 589. July number, 1868, American Law Review, to which the attention of the Court is specially invited.

If then the Mississippi is a navigable river, as to riparian rights, the accretions belong to the sovereign, and Congress had an undoubted right to grant them to the County of St. Clair, ~~to which the attention of the Court is specially invited~~.

XV.

The decision of the Supreme Court of Illinois in the present case of which we complain, starts with the very positive, but somewhat surprising declaration that "if the land of the riparian proprietor was bounded by the Mississippi, his right to the possession and enjoyment of the alluvion is not affected, *whether the stream was navigable or not.*

We do not wish to spend any time in criticising this legal dogma. Neither do we think that the maxim "*de minimis non curat lex*," to which the Court refers is happily applied, when the accretions, for a part of which this suit is brought, comprise some 300 acres in the whole, worth at least a million of dollars. Neither can we appreciate the distinction between the accretions and the bed of the river, for the river bed was up to 1852 where the accretions now are. The river being turned westward by the dyke made at the north, and back-water prevented by the dyke south, the old bed of the river became apparant again. The accretions settled precisely on the old bed of the river, and the accretions, as they are called, sued for, are really the bed of the river as it was when the militia claims and the Coudaire claim were first surveyed.

If we are correct in this, the whole reasoning of the Court falls to the ground, for the Court admit that the river bed could not be claimed by defendant. If the bank of the river had always remained the same, then land formed on the front of it might be such accretions, of which the law takes no notice.

We also do not share in the belief of the Court that the claimants who made their claims in 1804 and who were simple french hunters and fishermen, who cultivated off and on small patches of maize, gumbo and red pepper on the Mississippi, then "realised the vast importance of the Mississippi River to them and to all the people bordering upon it in the grand future *soon* to be unfolded." They did not and could not then anticipate the appliance of the power of steam to boats or to the locomotive, without which this region of country to day would be very little less of a wilderness than it was then. Notwithstanding that the Court say, that "it needed no prophetic eye to foresee prior to the year 1850 these grand improvements which bring the products of an Empire to the father of waters" we are decidedly of opinion that if Jean Dumochelle had foretold all that in 1804, he would have been most justly entitled to the appellation of a prophet.

We are likewise constrained to dissent from the position taken by the Supreme Court of Illinois, that the riparian owner was entitled to the accretions, "forced upon him by *the labor of others*, whithout his consent or connivance, and thus cutting him off from the benefits of his original proprietorship, and that neither the State nor any other individual can divert the water from him by artificial structures which cause deposits between the old and new bank, so as to divest him of the use of water."

For in the first place the testimony shows (see V. Jarrot's testimony) that had the structures not been made, not only what was left in 1852 of the three surveys in question would have been swept away, but *all* of the

City of East St. Louis, which extends some mile or more farther east. By those structures not only a portion of the original surveys was saved, but all of the ground originally included was reclaimed, and is the undisputed property of the defendants, as the County only claims west of the original lines, that is to say the old bed of the river, and in the second place, while the riparian owner might have prevented the State or other individuals from turning the river from their banks, which some other shortsighted riparian owners actually attempted to do by enjoining the City of St. Louis from building the dyke.

V. Gillman, Ill. Rep. p. 351, People *vs.* City of ~~Saint~~ Louis.

It does by no means follow, as it strikes us, that by acquiescing in such turning off the stream the riparian owner gained any rights whatever in addition to those which the law of the land gave him. If he was bounded by a *navigable* river, the accretions belonged to the Sovereign, and if his land was bounded by distinct lines and limited to a certain quantity of acres, he was not entitled to them, even if the river was *not navigable.*

But we respectfully, but most emphatically dissent from the main position of the Supreme Court, as to the boundary of the land, the ownership of which is said to entitle defendant to the new made land or rather the old bed in dispute. This suit is brought for the new made land, or old bed, opposite survey 579, which survey was owned by N. Jarrot in right of Dumouchelle. That survey as well as the other two militia surveys 624 and 766, north of 579, were reported upon favorably by the Com-

missioners in 1809, and confirmed by the often mentioned laws of Congress of May 1, 1810, and February 20, 1812.

The *Coudaire* claim and survey (No. 786) was reported upon in 1813 and confirmed by a law of Congress of 1816. It comprises the three militia claims, and as to them as a matter of course is *utterly void*, even if the Coudaire patent did not expressly "*except and reserve the said surveys*, naming them, *from the transfer by these presents.*"

All that the Coudaire survey and patent could claim would be the fractions originally left between the eastern line of the three militia surveys and Cahokia Creek and a small piece south of the south line of survey 579 (Dumouchelle), which is not in dispute, though even that piece is covered by survey 759, the Cahokia common tract, confirmed to the inhabitants of the village of Cahokia by the laws af 1810 and 1812. The western line of the Coudaire survey *is absolutely the same* as the western line of survey 579 (Dumouchelle), as sworn to by the surveyors and even admitted by defendants witness Jarrot, and as is manifest from the field notes, which are the same as to both surveys, thus doing away with the idea of there being possibly some land between the Dumouchelle line and the Coudaire line. Besides the Government, according to the views of the Supreme Court, would never be guilty of the injustice to sell land in front of other land before sold and which had a river front. *The Coudaire survey and patent are therefore entirely outside of the present case*, and ought to have been excluded by the Court from consideration, although the Supreme Court makes one expression in the field notes in the Cou-

daire tract almost the *pivot*, on which their decision turns.

Now neither the survey, nor the field notes, nor the patent of the Dumouchelle tract (survey *579*) *make the Mississippi River the boundary*, but the line is run straight, from a point *on* the bank to a point in the river and nothing said in the field notes or shown in the plat, that it was bound by the river, or the land meandered the river. The Coudaire survey, we repeat, was lugged in this trial improperly and with a view to confuse, though it had not that effect upon the Jury, who decided the question as to the boundary according to the evidence before them, and the instruction of the Court for plaintiff, and the Supreme Court does not in any part of their opinion say, that the Jury *found against the evidence* as to the fact of boundary.

Now then, the Coudaire survey being left out of consideration, the Dumouchelle tract from which alone the defendants may claim, is clearly a *limited tract* and not entitled to accretions. That point was conceded by the defendants below, and in the Supreme Court of Illinois, and hence their great effort to bring in the Coudaire survey, *because the field notes of that survey say, thence north 5° E. up the Mississippi River and binding therewith.*

Now suppose, for arguments sake, that it was the Coudaire survey by which the rights of the defendants were to be measured, would they be in any better position? We think not, for neither the survey nor the patent show that the westerly line of the Coudaire survey was bounded by the river.

It runs from a certain point north in an angle of 5° E. and cannot bind the river, unless the river run quite straight, which in fact it did and which the Supreme Court admits, then the expression *binding the river* means no more or less than the statement of an *accidental fact*, to-wit that that line was running exactly along the course of the Mississippi River. It is not possible to *make a straight line between two points*, and at the same time make that line correspond with another line, which is not equally straight, which a river line occasionally only, as in this case, would be. So this binding the river merely establishes a fact as existing, but does not give the true boundary line itself any other direction or deviation, than what would be a straight line between two distinct points, the direction of the line being defined by two distinct points. Suppose field notes should say that a certain line commenced at a certain stone corner, marked A, and run to another stone corner, marked B., but should give the angle of the direction of the line wrong, would not the two stone corners control? We insist that they would.

We are not left however to our own construction of what must be understood by the term *binding the river*. This language has been considered by Courts before this.

In Hardin 59, Sanders *vs.* McCracken, it is held that a deed calling to run to a creek and down the creek with the meanders, *binding therewith* (the exact language in the field notes of the Coudaire claim) *conveys no right to the channel or the bed of the creek.*

See to the same effect 3 Bibb. 205, Yoder *vs.* Scoop.

Besides all that we contend that the intention of the grantor must also be gathered from the *quantity* allotted, and the circumstances surrounding the grant. We have already alluded to the law of Congress of 1791, by which each militia man was to have 100 acres and no more as applicable to the Dumouchelle claim. Now Coudaire's claim was a so called head right or settlement donation, the character of which claims is described in

II. Vol, A. St. Papers, Public Lands, p. 144,

granted under the resolve of Congress of 1788.

U. S. Statutes, Storey's Ed., Vol. I, p. 582,

which provides "for the laying off to the French and Canadian inhabitants and for their benefit three additional tracts adjoining the several villages of Kaskaskias, Prairie du Rocher, Cahokia (Coudaire's tract belongs to the Cahokia lands) and in the form of a parallelogram, extending *from* the Mississippi eastward to the ridge of rocks before described, and to such *extent as shall contain four hundred acres* for each of the families now living, &c., &c."

This donation is confirmed by act of Congress of March 3, 1791, before cited; and in the fourth section the term is used not *exceeding* to any one person four hundred acres.

In Orendorf *vs.* Steele, 2 Barb. S. C. A. 128, where there was a question as to whether a grant to a line to the river and thence down along said river, would carry that line (no other owners being given on the river) to the middle of the river, the Court said: "*It appears on the face of the patent that the Colonial Governor, in iss-*

uing this patent, pursuant to his instructions, acted under the direction of the Council, which allowed only 100 acres to be patented to each German emigrant, to be allotted and granted severally. — We are to look to the whole patent to enable us to give a just interpretation to any part of it; and we cannot but see, that it was the leading object and intent of the parties to convey to each patentee 100 acres and no more."

In cases of doubt the construction of a grant is according to the English Common Law in favor of the Government and against grantee, and this doctrine applies in the United States most assuredly to all gratuitous grants, or donations. The language of the law of 1791 is that 400 acres should be *given*; the language of the resolve is that they should be laid off for the benefit of such inhabitants.

The Supreme Court of Illinois hold "that a grant from the Government is most strongly construed against the grantee, and whenever there is a doubt, it enures to the benefit of the Government."

Mills et al. *vs.* St. Clair County, 2 Gilm. 227.

It was equally improper to introduce the patent to Bloody Island, which never reached within 3-4 of a mile of the Dumouchelle Survey, and within the extended or projected lines of which the County claims the old bed of the river. We have already argued that the owner of Bloody Island could under no circumstances claim accretions south or north of their sectional lines, but only on the sides facing the river, nor could any improvements made by them to protect the river front of their island, have any bearing on turning the river westward, this

could only be done by break-water-dams above their island, which were made by the United States, and by the dyke connecting their island with the eastern shore of the river which was made by the City of St. Louis.

We conclude by again stating most emphatically that, independent of the question whether the Mississippi is a navigable river or not, the rights of defendants are solely to be measured by the conditions and character of the Dumouchelle tract and its proper boundaries, and, if we are correct in that, we are satisfied that the case must be decided for the County of St. Clair.

GUSTAVUS KOERNER,

Counsel for plaintiff in error.

SUPREME COURT

OF

The United States.

October Term, A. D. 1873.

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON and
THE WIGGINS FERRY COMPANY.

From Illinois Supreme Court.

DEFENDANTS' ARGUMENT.

WM. H. UNDERWOOD,

Attorney for Defendants.

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THE WIGGINS FERRY COMPANY.

From Illinois Supreme Court.

DEFENDANTS' ARGUMENT.

This was an action of ejectment commenced by the County of St. Clair and State of Illinois for the recovery of certain accretions or alluvial to survey No. 579, opposite the City of St. Louis in the State of Missouri, and lying between said Survey and the Mississippi river. Plea the general issue. Trial by jury in the St. Clair Circuit Court on the third day of November, A. D. 1871. Verdict that defendants were guilty, &c., and that the plaintiff was entitled to an estate in fee simple to the premises described in the declaration. Motion for a new trial overruled by the Circuit Court *pro forma*; exceptions to said ruling and case taken to the Supreme Court of Illinois. The Supreme Court of Illinois reversed said judgment at the June term, A. D. 1872, and decided that said County had no interest in said lands and

the title thereto was in said Wiggins Ferry Company for the reasons given in the opinion of said Court attached to the record in this case.

The Bill of Exceptions contains all the evidence and plats necessary to a clear understanding of the case.

The land in question was all made land by the works constructed by the United States Government, above Bloody Island, known as Island No. 3, or by the Dyke from Bloody Island to the Illinois shore, or by a railroad extending its track into the river south of the accretions in question; or by the works of the said Wiggins Ferry Company constructed on the west side of said Island, or by all these combined with the action of the river. Col. Jarrot testified that the tendency of the river was to wash away the head of Bloody Island and form at its foot and that the breakwater put by the U. S. Government above the head of Bloody Island on the eastern shore, had a tendency to turn the channel and make the accretion. McClintock testified that the rock put by the Wiggins Ferry Co. on the west side of the Island had the same tendency. Jonathan Moore testified that he could not say that the works of the Railroad below and the dyke above, made this land, "Should think it was making without them. It has formed a good deal faster since the dyke was made,"—as appears in the record.

The plats of survey 579, indicate that its west side was on the Mississippi river. Its field-notes are as follows: "Surveyed for Nicholas Jarrot, who claims in right of Jean Dunvehele, 100 acres of land. Beginning on the bank of the Mississippi river opposite St. Louis, from which the lower window of the United States Storehouse in St. Louis bears N. 70 3-4 W.; thence S. 5 West 160 poles to *a point in the river* from which a sycamore, 20 inches in diameter bears S. 85 E. 250 links; thence S. 85 E. 130 poles (at 30 poles a slash) to a point; thence N. 15 W. 170 poles to a forked elm on the bank of Cahokia creek; thence N. 85 W. 70 poles to the beginning."

The County claims title, 1st, under an act of Congress as follows:

"CHAP. CCCI.—An Act to confirm Title to certain Lands in Illinois.

July 15, 1870. Title of the U. S. to certain lots &c., in St. Clair County Illinois confirmed to said County.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the title of the United States to all lots, out-lots, tracts, pieces, parcels, and strips of land, in St. Clair County, State of Illinois, lying and situate outside of the United States surveys, as noted in the field-notes of the United States Surveyors, and on the Mississippi river near surveys seven hundred and sixty-six, six hundred and twenty-four, and five hundred and seventy-nine, and near and adjacent to fractional sections one, two, eleven and twelve town[ship] one north, range ten west third principal meridian, be and the same is hereby, confirmed and granted to said St. Clair County in said State; *provided*, that nothing herein shall apply to the ancient French Commons in said County." Approved July 15, 1870. United States Statutes at large, Vol. 16, pp. 364, 365.

Was it the intention of Congress to donate to the County of St. Clair lands worth many millions of dollars, *not surveyed or noted* on government plats. including in this case several thousand acres, in the year 1870 — at a time when all the property of the Government was needed to pay her war debts, to be counted in billions, and while no lands were donated to the soldiers or their widows and orphans? And would such a donation be made at that time to one of the most wealthy and populous Counties in the State of Illinois?

That act purports to donate to said county, the title of the United States, if any, to all *lots*, *out-lots*, *tracts*, *pieces*, *parcels and strips* of land outside of the United States surveys *as noted in the field-notes of the United States Surveyors*, and on the Mississippi river near, not joining as they do, surveys 766, 624 and 579, and near and adjacent to fractional sections

1, 2, 11 and 12, town one (*quaere two*) north, R. 10 west of 3d P M.

See 16 U. S. Statutes at large, p. 416, Act as amended February 18, 1871.

This law and the swamp law should be expounded as having reference only to public lands recognized in the United States Land-Offices or by the United States authorities, and not to accretions on the Mississippi, which the report of the United States Land-Office of 1868 on pages 121, &c., treated as belonging to owners of land bounded on the river. And such has been the settled doctrine of the United States and its authorities ever since A. D. 1836, when the case of New Orleans vs. The United States was decided in 10 Peters' U. S. R. p. 717.

2nd. The County claims title also under the Swamp Land Act entitled "An Act to enable the State of Arkansas and other States to reclaim the 'Swamp Lands' within their limits." Approved February 28th, 1850, and found in 9 U. S. Statutes at large, pp. 519, 520. This act manifestly was only intended to cover unsold "swamp and overflowed lands," made unfit thereby for cultivation, at the passage of this act, and to which the Land-Offices afforded evidence of existence; inasmuch as section 2 provides, "It shall be the duty of the Secretary of the Interior to make out an accurate list and plats described as aforesaid and transmit the same," to the Governors of the respective States where they existed; and that at the request of such Governors, cause patents to be issued to the States therefor. See secs. 2 and 4 of said act.

The Legislature of Illinois evidently so understood that law. By secs. 8 and 9 of the act of 1854, p. 21, the evidence of title furnished by the Secretary of the Interior was required to be filed in the Auditor's Office; and the Auditor of Public Accounts was required to furnish each of the several Counties a "correct abstract or list of said lands, certified by him under seal of his office." "And the lists so made out shall be sufficient evidence

of the title therein described." Said lists to be forwarded to Clerks of County Courts and filed in their offices, and there recorded. The Auditor was required "to cause the lists or patents received from the General Government to be recorded in a well-bound book, and preserved in his office;" and "certified abstracts, or diagrams, therefrom shall be evidence of the facts therein stated."

So, by section 3, of the act of 1852, p. 179, the Auditor was required within a reasonable time, after the passage of said act, "to furnish to each of said Counties a full abstract of all the swamp and overflowed lands within the limits of the same," etc., to be recorded in a book in the County Clerk's office, etc.

Section 5 of that act makes it the duty of County Surveyors who have surveyed "said swamp and overflowed lands in their respective Counties to make out plats of the same," the quantity, quality thereof, etc.; and their plats shall be recorded, etc Sec. 13 requires the Surveyors, etc., shall also report what part of said lands are susceptible of drainage, and the probable cost thereof.

If this be the true construction of the act of Congress in relation to swamp and overflowed lands, then the supposed title of the County to this land, as such lands, fails. And the certificate of the County Surveyor, Hilgard, made as he states, is a nullity. All the surveyors admit that the land in controversy was never surveyed or platted by a United States Surveyor; and the said County Surveyor testifies that all the land in question was under water as late as 1854. The Moores, who surveyed the land for the State and County in 1852, never surveyed or platted this land as swamp land. Their testimony and plat show that they only surveyed lands then above water around Bloody Island, outside of United States surveys. Their plat appears in Albert Moore's testimony.

It will not be contended, we presume, with any hope of success, that the Swamp Land Act of Congress was designed or did transfer to the States, accretions or alluvion at the date of the

Act of Congress or since, belonging to the riparian proprietors on the Mississippi river, for reasons to be presented hereinafter.

The plaintiff in an action of ejectment must recover on the strength of his own title and right of possession. City of Cincinnati vs. White, 6 Peters' U. S. R. 431; Penn vs. Holme, 21 Howard U. S. R. 481; Stewart vs. Dutton, 39 Ill. R. 91, and cases therein cited.

Title of Wiggins Ferry Co. and of Lovingston, its Lessee.

This title is founded on an act of Congress entitled "An Act for granting lands to the inhabitants and settlers at Vincennes and the Illinois country, in the territory northwest of the Ohio, and for confirming them in their possession." Passed March 3, 1791. The fourth section of which is as follows:

Sec. 4. *And be it further enacted*, that where lands have been actually improved and cultivated at Vincennes, or in the Illinois country, under a supposed grant of the same, by any commandant or court claiming authority to make such grant, the Governor of said territory be, and he hereby is empowered to confirm to the persons who made such improvements, their heirs or assigns, the lands supposed to have been granted as aforesaid, or such parts thereof as he, in his discretion, may judge reasonable, not exceeding to any one person, four hundred acres." 1 U. S. Statutes at large, p. 221.

Also a report made by Mich. Jones, dated January 18, 1813, under the head of "Statement of Claims founded on actual cultivation and improvement and the act of Congress of the 3rd of March, 1791."

* * * * * * *

No. of Claim 2667, Pierre Condaire original claimant, heirs of P. Condaire present claimant.

"Baptiste Ortis, Nicholas Herbert Lecompte and Hyacinthe St. Cyr, state that about twenty-six years ago (1783), Pierre Condaire inhabited and cultivated a tract of land east of the Mississippi, fronting the town of St. Louis; that he remained on

the said tract for three or four years ; that he had a house built on the said improvement, and generally sold the produce of his said farm at St. Louis. *Note.*—This statement is corroborated by the certificate of Auguste Chouteau of St. Louis."

* * * * * * *

"The preceding claims appear to be founded in justice, but which have not been claimed within the time limited by law.

MICH. JONES."

American State Papers, Public Land, vol. 2, p. 615.

Also, "An Act of Congress confirming certain claims to land in Illinois territory and providing for their location." Sec. 2, of which provides that all the claims contained in said list of Michael Jones should be and were thereby confirmed. Sec. 3 gives the township lines for such location, which covers all of St. Clair County, and extends from Jackson to Monroe County, in Illinois. And it should be the duty of the Commissioner of the General Land Office to enter the list aforesaid of record in his office. See vol. 3, U. S. Statutes at large, pp. 125, 126.

Also an act of Congress to amend and extend the last preceding act, passed February 27, 1815, the first section of which amended act is substantially as follows.

"That the western boundary of the tract of country set apart," by the preceding act "be extended upon the river Mississippi to the middle thereof, so as to include all islands in said river between the middle and eastern margin, throughout the length of said line, and that all or any of the said islands shall be subject to be appropriated under the said recited act." 3 U. S. Statutes at large, p. 218.

The plats of the Condaire Survey No. 786, Claim 2667, and the other Surveys covered by it, indicate the Mississippi river as their western boundary. The field-notes of the Condaire Survey made January 15, 1815, are as follows.

"Surveyed for the heirs of Pierre Condaire, who claim in right of Pierre Condaire, 400 acres of land on the east bank of

the Mississippi river, and opposite to the Town of St. Louis. Beginning at a post on the northwesterly of the heirs of Richard McCarty's Survey No. 626, Claim No. 1316 from which a hackberry, 6 inches in diameter, bears south 51 deg. E. 22 links and a honey locust 3 inches in diameter bears north 30 deg. W. 12 links ; thence S. 30 deg. 50 min. W. with said line of said survey 17 poles to a post from which an elm 18 inches in diameter bears S. 25 deg. W. 40 links ; thence S. 51 deg. 10 min. E. with another line of the heirs of Richard McCarty's said survey (passing a corner of Nicholas Jarrot's Snrvey No..... Claim No. 100 at 36 poles) 134 poles to a post on the westerly side of the river L'Abbe or Cahokia Creek ; thence down the said River or Creek, with the different courses thereof, S. 74, W. 9 poles, N. 28, W. 26 1-2 poles, N. 80, W. 17 poles, S. 66, W. 17 poles, S. 10 W. 13 poles, S. 32 poles, S. 5 deg. W. 30 poles, S. 21 W. 182 poles, S. 12 E. 50 poles, S. 23 E. 22 poles, S. 12 W. 22 poles, S. 37 deg. E. 88 poles, S. 20 E. 54 poles, to a post from which—thence N. 85 deg. W. 174 poles, *to a post on the bank of the Mississippi River, from which—thence N. 5 deg. E. up the Mississippi River and binding therewith* (*passing* the southwesterly corner of Nicholas Jarrot's Survey Number 579, Claim 99, *at* 6 *poles*) 551 poles and ten links, to a post northwesterly corner of Nicholas Jarrot's Survey No....., Claim No. 100, from which a sycamore 36 inches in diameter, bears S. 21 deg. W. 29 links, thence S. 85 deg. E. with the upper line of the last mentioned Survey 88 poles to the beginning.

JANUARY 15, 1815.

True Meridian V 8 deg. 25 min. E., Magnetic Meridian, by which this Survey was made."

"A true copy of the original Field Notes on file in this office.
W. W. H. LAWTON, Custodian U. S. Surveys."

The plats certified by said Custodian are of Island No. 3 (Bloody Island), Surveys No. 579, 624, 766 and 786, and their surroundings. Another plat and field-notes were given in evidence, obtained from the Land Office at St. Louis before it was

removed to Springfield, and are in all respects like the foregoing plat and field-notes. The plat and field-notes purport to have been made by Messrs. Rector, Surveyors of private claims in the district of Kaskaskia ; and Survey 786 purports to cover and extend beyond the other three Surveys.

Also a patent from the United States, dated May 31, 1848, to the heir of Pierre Condaire in right of said Pierre Condaire or his legal representatives, heirs or assigns, for said Survey No. 786, subject to the claims included in said Surveys 766, 624 and 579 which are excepted and reserved from transfer by said patent.

Also a patent from the United States to Nicholas Jarrot, dated May 1, 1848, and to his heirs and assigns for said Survey 579 ; between which and the river the land in controversy in this suit lies.

Also two United States patents to Samuel Wiggins for Island No. 3 aforesaid ; both dated June 9, 1825. One is for fractional section 11, T. 2 N., R. 10 W. containing 128.86 acres ; the other is for fractional section 2, T. 2 N., R. 10 W., containing 3.47 acres.

Also the plat of United States Surveys of the same.

Also a deed in fee simple from Joseph Condaire to N. Jarrot, dated April 17, 1809, purporting to convey said Condaire claim, and describing the said Joseph Condaire as the sole heir of Pierre Condaire, duly acknowledged and recorded.

Also the last will and testament of said Nicholas Jarrot duly proved on the 18th of December 1820 ; giving Julia Jarrot, his widow and executrix, authority to sell his real estate.

Also a deed in fee simple from said Julia Jarrot under said will to Samuel Wiggins for the land patented to said Jarrot as aforesaid and for said Condaire Claim and Survey. This deed is dated July 13th, 1822.

Also a deed from Samuel Wiggins and wife to O'Fallon and others, dated August 1, 1831, for the land on Bloody Island and the Condaire and Jarrot Claims and Surveys.

Also the private act of the Illinois Legislature of 1853 to incorporate the Wiggins Ferry Company, with power to acquire said lands and franchises. etc. It recites an act of said Legislature of 1819 authorizing said Samuel Wiggins, his heirs and assigns to establish a ferry on the Mississippi near the town of Illinois in said State and run the same from lands that belong to him; and recites another act of said Legislature of 1821. It gave to a Court of Chancery jurisdiction for the sale of said ferry franchise and property.

Also the proceedings of the St. Clair Circuit Court in Chancery and a decree against said grantees of Samuel Wiggins who were parties thereto, directing the sale of said franchise and property.

Also a deed made by the Master in Chancery under said decree to the Wiggins Ferry Company for said ferry franchise the land on said Island No. 3, and the said Jarrot and Condaire Surveys. Under which the Ferry Company claims title in fee simple to the said lands and the alluvion and accretions thereto.

The confirmation of the two Surveys was higher evidence of title than a patent. They were titles by direct act of the government, whereas a patent is only the act of its ministerial officers. Gignon's Lessee vs. Astor, 2 How. U. S. R., 344. A confirmation followed by a survy of land by U. S. authority is conclusive evidence of title; and a subsequent sale by the United States and a patent to a third person is void. Richert vs. Phelps, 6 Wal. U. S. R. 160. Glasgow vs. Horties, 1 Black U. S. R. 595. Ballance vs. Tesson, 12 Ill. R. 326. So a patent from the Government of the United States, for accretions to land which land was before that time conveyed by the Government, for the same reasons, is void. Kreut vs. Crawford, 18 Iowa R. 549.

The certificate of the U. S. Surveyor Rector was record evidence of the boundaries of said Surveys. Kissel vs. St. Louis

Public Schools, 18 How. U. S. R. 19. And that original survey must be followed. Bates vs. Ill. C. R. Co., 1 Black U. S. R. 204.

There is no pretense or evidence that the United States authorities or the city of St. Louis, or the persons who constructed the dyke above, or the railroad track below, did so for the purpose of producing these accretions. Riparian proprietors might incidentally suffer or gain by such public works; and the parties causing such public works to be constructed, never set up any claim to these accretions as a result of their labor. Had they done so the claim would have been unavailing as against the owners of the property, who simply acquiesced in those works made for other purposes.

Even where soil is by sudden action of the water, deposited upon the land of another, it does not belong to the first owner when he suffers it to remain in its new position until it cements and coalesces with the soil of the second owner; in which case the property of the soil is changed, and no right to reclaim it remains. 2 Washburn on R. P. 452, 453; Angell on Watercourses, Sec. 60; Bouvier's L. Dic. Title *Avulsion*; Woodbury vs. Short, 17 Vermont R. 387. The title to land extends to the center of the earth and water over it. 2 Black. Com. (18). The owner of land at common law is under no legal or moral obligation to pay for improvements made on his land without his request. Carson vs. Clark, 1 Scam. R. 113.

The fact that these accretions may have been caused in part by the works of others made for other purposes is wholly immaterial. Halsey vs. McCormick, 18 N. Y. R. 150; New Orleans vs. United States, 10 Peters' U. S. R. 662; Jones vs. Soulard, 24 How. U. S. R. 41; R. R. Co. vs. Schumier, 7 Wal. U. S. R. 287; The Schools vs. Risley, 10 Wal. U. S. R. 110; Godfrey vs. City of Alton, 12 Ill. R. 29.

On no river in the world is the doctrine of accretion more justly applicable than on the banks of the Mississippi river, where from June, and other floods, the channel and banks are constantly

changing. Lands in controversy on this river, may any year disappear in its waters as did, since the suit for it, Duncan's Island, situated on the otherside of this river nearly opposite the lands in question from the same causes that produced the alluvion now sued for. That case is decided in 24 Howard U. S. R. 41 &c., and this case must be controlled by principles therein announced. It is well said by this Court, per McLean, J., in New Orleans vs. United States, 10 Peters' U. S. R. 717, "The question is settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory and as he is without remedy for his loss in this way he cannot be held accountable for his gain."

In all the subsequent cases decided by the U. S. Courts the owner of land bounded on that river was held entitled to the accretions thereto. Saulett vs. Sheppard, 4 Wal. U. S. R. 502. In Jones vs. Soulard, 24 How. U. S. R. 65, the Court, per Catron, J., says: " 'From thence by the Mississippi to the place first mentioned' is as apt expression to confer riparian rights to the proprietor of the tract as the call could well be, unless the last call had been for the middle of the river."

"Many authorities resting on adjudged cases have been adduced to us in the printed argument to show that from the days of Sir Matthew Hale to the present time all grants of lands bounded by fresh-water rivers, where the expressions designating the water-line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions." "We think this as a general rule to be well settled, as part of the American and English law of real property, to be open to discussion ; and the inquiry here is, whether the rule applies to so great and public a watercourse as the Mississippi is, at the city of St. Louis? The land grant to which the accretion attached has nothing peculiar in it to form an exception from the rule ; it is an

irregular piece of land, of seventy-nine acres, found vacant by the Surveyor General, and surveyed by him as a school lot, in conformity to the act of 1812."

"The doctrine, that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark has no application in this case: nor does the size of the river alter the rule. To hold that it did. would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers, as matter of fact, rather than proceeding on established principles of law."

In Railroad Co. vs. Schumier, 7 Wal. U. S. R. 286, 287, this Court, per Clifford, J., says: "Express decision of the Supreme Court of the State (Minnesota) was that the river in this case and not the meander-line, is the west boundary of the lot, and in that conclusion of the State Court we entirely concur. The meander-lines are run, in surveying portions of public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fractions subject to sale and which is to be paid for by the purchaser. In preparing the official plat from the field-notes the meander line is represented as the border line of the stream, and shows to a demonstration, that the watercourse, and not the meander-line as actually run on the land, is the boundary."

"Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream; but the better opinion is that proprietors of land bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be and remain public highways. Grants of land bounded on rivers above tide-water, says Chancellor Kent, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage,

subject to the *jus publicum*, as a public highway. 3 Kent's Com. (427)."

"The views of that commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river; because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the center of it; and he consequently holds that the fee passes to that extent. Decided cases of the highest authority affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the common law prevail, as understood in the parent country. Except in one or two States, those rules have been adopted in this country, as applied to rivers not navigable, when named in a grant or deed as a boundary to land."

In The Schools vs. Risley, decided in December, 1869, 10 Wal. U. S. R. 110, in relation to accretions to land in St. Louis opposite to the tract involved in this suit, the Court, per Clifford, J., says: "Beyond doubt, block forty-four, if it was inhabited, cultivated and possessed prior to December 20, 1803, as claimed by the defendant, was confirmed by the first section of the act of June 13, 1812; and if it extended to the river at that time it is clear that the owners thereof were riparian owners; and if so, it is equally clear that they were entitled, as such, to all the accretion thereto occasioned by alluvial deposits or by the gradual recession of the waters of the river from the usual water-mark."

The highest Court in every State on the Mississippi river from St. Paul to New Orleans has decided that accretions belong to owners of land on that river, as riparian proprietors.

In *Minnesota*, Schumier vs. The Railroad, 10 Minn. R. 82.

In *Iowa*, Kreut vs. Crawford, 18 Iowa R. 549.

In *Wisconsin*, Jones vs. Pettibone, 2 Wis. R. 308; Walker vs. Shephardson, 4 *id.* 486.

In *Missouri*, Shelton vs. Maupin, 16 Mo. R. 128; Smith vs. St. Louis Public Schools, 30 Mo. R. 290.

In *Arkansas*, Warren vs. Chambers, 25 Ark. R 120.

In *Kentucky*, Thurman vs. Morrison, 14 B. Monroe R. 371, 17 Id. 253.

In *Tennessee*, Stuart vs. Clark's Lessee, 2 Swan's R. 9; Corporation of Memphis vs. Overton, 3 Yerger R. 387.

In *Mississippi*, Morgan vs. Reading, 3 Smeades & Marshall R. 366; Magnolia vs. Marshall, 39 Missip. R. 111. This last case was very ably argued and well considered.

In *Louisiana*, Morgan vs. Livingston, 6 Martin R. 19, 25; Municipality No. 2 vs. Orleans Cotton Press, 18 Lou. R. 122.

In *Illinois*. The leading case in this State is Middleton vs. Prichard, 3 Scam. R. 510. That case was decided in 1842, after an exhaustive examination of the authorities by the Court. The Court decided that on the Mississippi river all alluvion belongs to the riparian proprietor, both by the common and civil law. The same rule holds as to losses by gradual washing away; and the owner of a fraction of land surveyed on the banks of the river was entitled to an island formed between his land, after it was surveyed, and the center of the river. This is said, in 3 Kent's Com., 11th ed. (427) note *d*, to be "a clear and frank exposition of the common law in this learned case, and especially in respect to Government grants." That "it does honor to the Court that delivered it." "These decisions of the Court of Illinois and Mississippi are highly creditable to their learning and firmness," etc.

In 1868 the question was again before the Supreme Court of Illinois, in the case of Ensminger vs. The People, 47 Ill. R. 388, 389. The Court says: "There can be no doubt when the case in 3 Scam. R. was determined, it announced the rule held by the current of authorities of that day, and a careful examination of adjudged cases and elementary writers of the present day, show they announce the same rule," etc. "If this rule were changed it would deprive large numbers of rights, in the aggregate amount-

ing to immense sums which they had acquired under, as they supposed and had every reason to suppose, a solemn assurance of the law that they should be protected in those rights. The promotion of justice, the stability of titles, or the well-being of society, do not require that this decision should be disturbed," etc. "We, therefore, decline to review the grounds of that decision, but accept it as the settled law of this State." The authorities in this State are afterwards reviewed by the same Court in Chicago vs. Laflin, 49 Ill. R. 175, 176, and the same conclusion announced.

Accretion, or alluvion, is the addition made to land by the washing of the sea or rivers; and the characteristic of alluvion is its imperceptible increase, so that it cannot be perceived how much is added in *each moment* of time. What is taken from one side is usually carried on the opposite bank. In cases where the change is so gradual as not to be perceived in any one moment of time, the proprietor whose bank on the river is increased, is entitled to the addition. Alluvion differs from avulsion; (*q. v.*) in the latter the change is sudden and perceptible. Bouvier's Law Dictionary, title *Avulsion*, and authorities therein cited; 2 Blackstone's Com. (262); Angell on Watercourses, Sec. 53. In section 54 the word Imperceptible, is defined and illustrated. In note 1 to that section Mr. Livingston's remarks in the case in 10 Peters R. already cited, are stated as follows: "When the ingenious counsel can analyze the different deposits, separate the sands of the Red River, the rich mould of the Missouri, from the clay and other various soils which the Mississippi receives from a thousand tributary streams; when he can dive into its turbid eddies, watch the moment of its precious deposits, and date the existence of each stratum of its increase, then this first branch of the authority he has just cited may be applicable to his cause." See also Lamb vs. Ricketts, 11 Ohio R. 311.

When the Government sells or confirms land on the Mississippi river, where the quantity of land to be enjoyed is so uncertain, it is desirable to know how much is immediately available for

cultivation or ordinary use, hence the survey is made of the land not covered by the river although it is evident from the act of February 11, 1815, in relation to confirmations of land on this river within the territory where this land was confirmed, that Congress intended the middle of the river to be the western boundary of the land. The lines were run not as boundaries of each tract, but for the purpose of defining the sinuosities of the stream, and as a means of ascertaining the quantity of land then available for use. Middleton vs. Prichard, 3 Scam. R. 510, 522; Railroad Co. vs. Schumier, 7 Wal. U. S. R. 272, 286, 287.

All the plats in this case indicate that the Jarrot Survey, No. 579, (between which and the river the land sued for lies), was intended to have been bounded on the river, but the field-notes of said survey begin on the bank of the river, thence S. 5 W. 160 poles to "a point in the river," etc. This was perhaps to include the 100 acres and to make the west line straight and avoid the sinuosities of the bank. These surveys and plats should all be taken together and made to harmonize if possible with the intention of the U. S. Surveyors at the time, if not inconsistent with the laws of the U. S. government.

Thus it will be seen that had the Wiggins Ferry Co. only shown title under survey 579, they might be entitled to the accretions to said survey, and the river fronting the same as a boundary, as against all but the Condaire survey and perhaps against that, as a prior survey thereto. The title to the land on Bloody Island entered by Samuel Wiggins under the act of April 16, 1814, and February 27, 1815, gave him the middle of the river as his western boundary and the right to the accretions on the south end of said Island except as against riparian proprietors south of his said entry and who were entitled to a river front.

The original channel of the Mississippi river, was west of Bloody Island. It afterwards changed for a time to the east side of that Island, and was subsequently thrown back to its old

channel west of that Island where it now runs, as appears by the record in this case of the testimony of Jonathan Moore, A. G. Moore and Col. Jarrot.

The defendants' title under the Condaire survey No. 786, settles beyond all controversy the right to these accretions The western line of that survey was from a post on the bank of the Mississippi river, thence "up the river and *binding therewith, passing* the southwesterly corner of said survey 579," etc. No surveyor or jury could lawfully say this line was uncertain as the west line of the other surveys. If the river was not intended as the western boundary the field-notes would not say "binding therewith," and more than two points would be given on the west side.

Condaire was entitled to four hundred acres of land; and this survey only gave him about one hundred acres of land then available for use, as appears from Col. Jarrot's testimony. The other three hundred acres within the lines of his survey before the survey for him, had been confirmed to other parties; and the patent to him expressly excepted from its operation those three prior surveys. All left for his survey was the lands covered thereby outside of said three surveys; with a chance of alluvion on the river. "In those three surveys" Col. Jarrot testifies, "there is nothing said about binding with the river, etc., there might be some pieces of land left between those claims and the river which the Condaire claim would cover. It is very possible there were. It is not likely that the river was so straight that they could run each of those three tracts its whole length straight and follow the river. The river was not that straight." With the accretion sued for, Condaire's grantee would only get his 400 acres. When a line is described as running in a certain direction to a river, thence up or down the same, or with the river, those words necessarily imply that the line is to follow the river according to its meanderings and turnings; and that of course must be the middle of the river. Angell on Watercourses, secs. 17, 28, 29, 30, and notes; 3 Kent's Com. (427). And that is so, although the

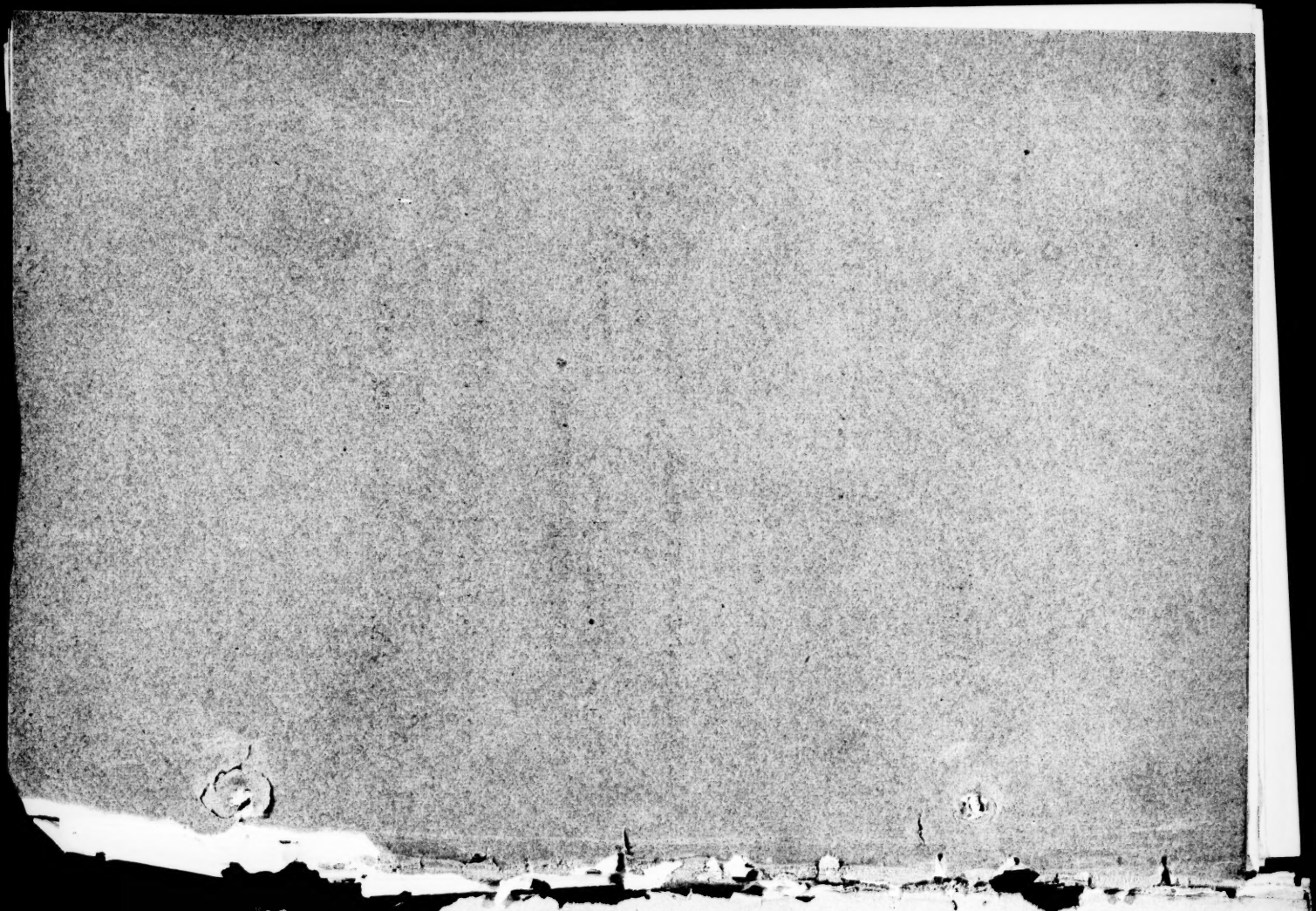
monuments are described as standing on the margin or banks of the stream. Coldwater Iron Works vs. Ins. of Tolland, 9 Cush. (Mass.) R. 496 ; Harlow vs. Fiske, 12 *id.* 302.

Under this rule of the common law, as well as by the act of Congress of February 27, 1815, before referred to, the heir or legal representatives of Pierre Condaire were entitled in fee, subject to the public easement, to the middle of the river as it then existed, with its channel west of Bloody Island, where it now is, including the land in controversy in this suit ; and the deposits on said land do not divest them of said title, even if under the peculiar circumstances of this case the Jarrot survey should be limited to its original surveyed line on the west. In conclusion, we will call the special attention of the Court to the unanimous decision of the Supreme Court of Illinois in this case, and its forcible reasons, as given by Thornton, J.

After having the pleasure of seeing the printed arguments for plaintiff in error in this Court we may attach to this argument a reply thereto, if we deem it necessary ; assuming that no plausible grounds, which ability, ingenuity and industry can present, will be omitted by the learned attorneys for the plaintiff in error.

WM. H. UNDERWOOD,

Nov. 24, 1873. *Attorney for Defendants.*



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No 463

No. 463.

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE COUNTY OF ST. CLAIR, Plaintiff in Error,

vs.

JOHN B. LOVINGSTON and THE WIGGINS FERRY CO.

Defendants in Error.

Writ of Error to the Illinois Supreme Court.

Argument and Brief of LOUIS HOUCK, for the County.

Cape Girardeau News. Print.

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE COUNTY OF ST. CLAIR, Plaintiff in Error, vs. THE WIGGINS FERRY CO. and JOHN R. LOVINGSTON, Defendants in Error.	Writ of Error to the Supreme Court of Illinois.

This is an action of ejectment, instituted in the St. Clair Circuit Court, where the plaintiff in error recovered judgment. On appeal to the Illinois Supreme Court the judgment was reversed. The case is brought here under the 25th section of the judiciary act.

The County claims title to the real estate in the declaration set out, situate west of the western line of Survey 579, as surveyed by the United States Surveyors, under the following Act of Congress:

"An Act to confirm title to certain lands in Illinois.

"*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled:* That the title of the United States to all lots, out lots, tracts, pieces, parcels

and strips of land in St. Clair County, State of Illinois, lying and situate outside of the United States Surveys, as noted in the field notes of the United States Surveyors, and on the Mississippi river, near surveys 766, 624 and 579, and near and adjacent to fractional sections, one, two, eleven and twelve, township one north, range six west, 3rd principal meridian, be and the same is hereby confirmed and granted to said St Clair county in said State, *provided* that nothing herein shall apply to be ancient French commons in said county."

This act was approved July 15th, 1870.

In 1871 the act was amended so as to read township two north, instead of township one north.

1. This act was approved February 18, 1871.

The county also claims title to the tract of land in controversy, under the following provisions of an act (See Session acts of 1859, p. 201,) of the Legislature of Illinois:

"That the County Courts of the several counties of this State be, and they are hereby, authorized and empowered to sell and dispose of, at public or private sale, for cash or credit, or such securities as the County Court may think proper to accep', all or any of the swamp or overflowed lands lying within the respective counties, including, also, all and every interest, claim, demand, and gift granted to them by the State of Illinois, arising under the act of Congress passed Sept. 28, 1850, and acts amendatory thereof."

In 1869 (See Public Session acts of 1869, p. 243) this act was amended as follows:

"That nothing in the first section of the act to which this is an amendment contained shall authorize the county court of St.

Clair county to sell, grant, convey or dispose of any land or lands lying outside of the lines of the United States Surveys situate in said county, but the county court of said county is hereby authorized to lease all or any lands so situate for such time or times as the courts of said county may think right and proper: Provided, that no lease shall be made for a longer term than 99 years. *Provided further*, that nothing herein contained shall render void any conveyance of such land heretofore made by said county, but such conveyances are hereby expressly confirmed: *Provided also*, that nothing herein contained shall apply or extend to any land or lands within the limits of the city of East St. Louis, in said county.

2. In all judicial proceedings, the certificate of the County Surveyor of St. Clair County, that the lands in controversy are outside of the lines of the United States Survey, shall be *prima facie* evidence that the county is entitled to the possession of the same.

The land in controversy embraces about one hundred acres.

The defendants in error (defendants below) claim title to the land by virtue of a confirmation of 100 acres, numbered Claim 99, Survey 579 to Nicolas Jarrot, under Jean Dumouchelle. The field notes of this Survey read as follows: "Beginning on the bank of the Mississippi river, opposite St. Louis, from the lower window of the United States Store House in St. Louis bears N 70 3-4 W; thence S 5 W 160 poles to a *point in the river* from which a sycamore 20 inches in diameter bears S. 85 F. 250 links; thence S. 185 E 130 poles (at 30 poles a slash) to a point; thence N. 15 W 170 poles to a forked elm on the bank of Cahokia Creek; thence N. 85 W 170 poles to the beginning"

And further claim title to the premises by virtue of a confirmation to Pierre Coudaire of 400 acres numbered claim 2667, Survey 786. The material portion of the field notes of this survey is the following: "Thence N. 85 deg. W. 174 poles *to a post on the bank of the Mississippi River, from which—thence N 5 deg. E. up the Mississippi River and binding therewith* (passing the southwesterly corner of Nicolas Jarrot's Survey No. 579, Claim No. 99, at 6 poles) 551 poles and 10 links, to a post north-westerly corner of Nicolas Jarrot's Survey No.——, claim 100, from which a sycamore 36 inches in diameter bears S. 21 deg. W. 29 links, &c."

The plat made by the United States Surveyor, and which accompanies Survey 579, *does not show the river as a boundary, but a straight mathematical line surrounds the survey* on every side. So also the court by reference to the plat of Survey 786 (called the "Coudaire" survey in the record) *will find, that the western line on the plat is a straight mathematical line.*

In addition to the title to Surveys 579 and 786, the defendants below also established title to fractional section 11, Town 2 N, R 20 west, containing 128.86 acres, as well as to fractional section 2, same township and range, being "Bloody Island," and situate three-fourths of a mile north of the northern line of the land in dispute.

Defendants in error claim, that their title to the soil extends to the centre of the Mississippi river, and that therefore the grants of the United States and the State of Illinois cannot avail the county.

I.

1. The Mississippi is a navigable stream in the highest

and broadest sense. The treaty with France and Great Britain in 1763, 7th art. stamped that character upon this river. But see also the 8th art. of the treaty of 1785; the 3rd art. of the "Jay Treaty" 1794; the 4th article of the treaty with the U. S. and Spain, 1795; and the 7th article of the treaty between the United States and France; so also the ordinance of 1787, 4th article. The ebb and flow of the tide is only *prima facie* evidence of navigability. Navigability in fact is the foundation of navigability in law. [Woolrych on Waters, 40; McManus vs. Carmichael, 3 Iowa 1-52; Haight v. Keokuk, 4 Iowa 212; LaPlaisance Bay Harbor vs. City of Monroe, Walker's Ch. 159; People vs. Canal Appraisers, 6 Tiffany 472-500, where the whole subject is discussed.]

If this position is correct the grants of defendants in error if bounded by the river, are limited by high-water mark—the top of the bank.

2. The statutes of the United States provide, that all navigable rivers shall be public highways, and rivers not navigable and the beds thereof shall belong to the opposite shoreholders in common. This act was passed with reference to the North-west territory, and in that territory there were no tidal rivers. The conclusion then is irresistible, that it was the intention of the law-making power to declare all actually navigable rivers as navigable, as usually understood at common law. [See act 1796, sec. 1 (2 Statutes at Large, p. 464); Walker's American Law, p. 261; 2 Statutes at Large, p. 464; Empire State v. Russell, Newberry's Admr. R. 551; Spooner v. McConnell, et al., McLean Ct. R. 345; 6 American Law Register, p. 241.]

3. If nevertheless it should be held, that the Mississippi is not such a navigable river, then it is respectfully suggested, that

the doctrine that the riparian owner holds to the centre of the stream is not the law in the states carved out of the North-west territory, because by the 9th section of the act of congress cited, it is expressly provided, "that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become to both." [See 2 Statutes at Large, sec. 9, p. 466. See also 1 Brightly's Digest p. 500, sec. 232.]

An express law says, that the riparian owners on non-navigable rivers shall be tenants in common of the stream and bed, but the defendants in error tell us, that the riparian owners hold in severalty to the centre of the stream.

The county plants itself upon the law of the United States.

If the 9th section of the act of May 18th, 1796 has any meaning, so far at least as Illinois is concerned, every adjudicated case based upon the English authorities carrying the riparian to the centre of the Mississippi in severalty must be held to be entirely inapplicable.

The opposite owners are tenants in common of the *stream and bed*, if the river be considered a non-navigable stream.

4. But in the case of Railroad Company vs. Schurmeir, 7 Wallace 388, this court referring to the act of May 18, 1796, (2d Statutes at Large, p. 466,) says:

"It is quite clear, that Congress did not employ the words *navigable* and *not navigable, in the sense usually understood in legal decisions.* On the contrary, it is obvious, that the words were employed *without respect to the ebb and flow of*

the tide, as they were applied to territory situate far above tide-waters, and in which were no salt water streams.

Viewed in the light of these considerations, the court does not hesitate to decide, that Congress in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways.

Although such riparian proprietors *are limited to the streams, still they also have the same right to construct suitable landings, and wharves for the convenience of commerce and navigation* as is accorded to riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide."

If correctly understood, the court holds in this case:

1. That under the act of 1796 the navigability of the waters in the Northwest is not determined by the ebb and flow of the tides, but by navigability in fact.

2. That as to rivers not navigable in fact, the old rule obtains; and

3. The riparian proprietors on actually navigable streams have the same rights as the riparian proprietors bordering on tide-water.

This court, however, *does not decide*, if the decision is correctly apprehended, that *the riparian proprietors on the navigable waters of the Northwest possess peculiar rights not appertaining to the riparian owner on tide-waters.*

5. Assuming that the Mississippi river opposite the city of St. Louis is navigable in fact, and that the riparian owners on it have the same rights as the proprietors of land bordering on tide-water, it is suggested:

(*a*) By the common law the crown is entitled to all increments, to alluvion as well as avulsions on tide-water.

[See Woolrych on Waters, side-page 445; Am. Ed.]

And the increase *per alluvionem* is defined to be "when the sea, by casting sand and earth, doth by degrees increase the land and shut itself out further than the ancient bounds went, and this is usual. The reason why this belongs to the crown is, because, in truth, the soil where there is now dry land, was formerly part of the very *fundis maris*, and consequently belonged to the king. But, indeed, if such alluvion be so insensible, that it cannot be by any means found, that the sea was there, *idem est non esse et non apparere*, the land thus increased belongs, as a perquisite, to the owner of the land adjacent." [Hale de Jure Maris, see 6 Cowen p. 541-2—*Ex-parte* Jennings.]

And where the sea relinquished a great quantity of land upon the shore, and the question was, whether the crown should have this by virtue of the prerogative, or whether the next adjoining owner should have it as a perquisite, it was held, that the prince should have the land left by or gained from the sea; whereas, if the sea leaves the land gradatim and but for a little quantity, the owner of the land shall have it.—[See Woolrych on Waters, side page 29, Am. Ed., and authorities there cited.]

(*b*) The increase must be *imperceptible*. But where, during a period of twenty-six or twenty-seven years, the gain was about

five yards and a half in a year, the increase was held to be "imperceptible."—[See King v. Yarborough, 3 B. & Cress, R. 91; S. C., 10 Eng Com. Law, R. 19; S. C. affirmed in the House of Lords, 2 Bligh (N. S.) 147.]

(c) In England great opposition has been made to this royal acquest in respect of a custom, called "custom of frontages," (especially in Lincolnshire,) and the custom was alleged to be, that those whose land lay in front of the sea should have the derelict soil. The reason urged in favor of the custom were, that those persons were obliged to keep up defences against encroachments of the sea; and that if any overflow happened they would necessarily be the sufferers. But the custom was denied to be valid upon consideration in the Court of Wards, by reason of the uncertainty as to quantity, which the subject might claim under such circumstances, for ten thousand acres might be left in front of a manor, and this would be too large an inheritance by virtue of such a custom. In one case, therefore, the claimant was put to obtain a grant from the crown, and in another a decree was made against the party asking to gain this derelict land under the custom of frontage. [See Woolrych on Waters, p. 29, Am. Ed., and references.]

(d) But where the increase is gradual and imperceptible, the alluvion goes to the adjacent riparian. Thus, in the case of the Abbot of Peterborough, who was questioned at the king's suit, for acquiring thirty acres of marsh without license of the king, the abbot pleaded the custom of the country, and made a defence of alluvion. The land came *per incrementum temporis*, and it was *terra per mare projecta*. The judgment was in favor of the abbot. [2 Mod. 107.]

In another case, the Abbot of Ramsey was charged in respect to sixty acres of marsh. The abbot said he held the manor of Brancaster, which was situate next the sea, and that there was a certain marsh, which, sometimes, was diminished by the influx, sometimes increased by the retirement of the sea, without this, &c. This was a claim, *jus alluvionis*, and the abbot had a verdict before one of the barons. The title stood upon that which the abbot alleged, by way of increment. He relied on no custom, but upon the principle, that, as he suffered loss occasionally, so, likewise, he ought, sometimes, to reap the benefit. [1 Dy. 326, (b) cited by Woolrych, side-page 444.]

(*e*) "But," says Woolrych, "it is not to be understood. *even in this case, that the crown is not entitled by its prerogative, to all this increment, to alluvion, as well as avulsion;* but, as Sir William Blackstone observes: *de minimis non curat lex:* and, besides, these owners, being often losers by the breaking of the sea, or at charges to keep it out, this possible gain, is, therefore, possibly a reciprocal consideration for such possible charge or loss."

Callis says, "that the soil of the sea and royal rivers belong to the king." [Callis, 115, cited in Woolrych, side page 439.]

Prima facie, says Mr. Justice Bayley, the lord of the manor, is entitled to high-water mark; but between high and low water mark, the right is *prima facie* in the crown.

[Dickens v. Shaw, 4 B. and C. 495.]

[Also see 3 Man. and Ry. 329; 10 Price 378.]

See, also, *Hall on the Rights of the Crown*, p. 19, where it is stated that the seashore can be granted in gross, *without the upland.* [Also 6 Law Magazine, and Law Review, 99.]

See also case of Lord Advocate v. Sinclair of Foss, 1 Scotch Appeals, 174, where the crown established title to 270 acres near the City of Chester. [Also see the Royal Fishery in the Banne, Davis, 149.]

[The Attorney General v. Chambers, 11 De Gex, M. & G. 206.]

[Gann v. The Free Fisheries of Whitstable, 11 House of Lord's cases, 192.]

[Duke of Buccleuch v. The Metropolitan Board of Works, L. R., 5 Exch. 221.]

(*f*) In America, the doctrine that land covered by the waters of a navigable river, or the shore can be granted by the State, has often been decided.

In *Gould v. Hudson R. R. Co.*, 2 Selden, 522, the Supreme Court of New York, discussing the question, says:

"He has no property in the river (Hudson), nor any right peculiar to himself as riparian owner, which entitles him to the action. The defendant's railroad was constructed by authority and permission of the people of the State—the sovereign power. The rights of the plaintiff are held in common with the public, and are subservient to the will of the public. *He can enjoy them until*

the public necessity or convenience renders it expedient, that he should be deprived of them."

And so Gould lost his river front, although bounded by a river. [See also Gould v. Hudson River R. R. Co., 12 Barb. 616.]

Nor, if the Mississippi is held to be a navigable river, will it be held, that the riparian has any rights beyond the top of the bank. "Indeed, in the language of the New Jersey Supreme Court, "I think it is safe to say, that no English lawyer speaking either from the bench or bar has ever asserted, that the owner of the land along the shore of navigable waters has any *peculiar right* by *reason of such property to the use of the water*, or *the shore.*" [Stevens v. Patterson and Newark R. R. Co., 34 New Jersey 532.]

The attention of the court is especially called to the learned and exhaustive opinion of Chief-Justice Beasley in this case, as well as to the authorities cited by him.

[See, also, the State v. the Mayor of Jersey City. 1 Dutch. 525.]

[Stewart v. Fitch, et al, 2 Vroom 18.]

(*g*) But the record shows, that the land in controversy was not an imperceptible increase by natural causes, but the result of an artificial cause—the dyke built by St. Louis. The land claimed, then, is not alluvion. [Halsey v. McCormick, 4 Smith (N. Y.) 147.]

(*h*) So that the statement of the Illinois Supreme Court, in this case, that the riparian owner has a right to the alluvion,

whether the stream be *navigable* or non-*navigable*, must be understood with these important qualifications:

(1) That the right to alluvion on non-navigable rivers is *absolute*, while

(2) On navigable rivers, the right is a *qualified* one, to say the least, depending upon the action of the sovereign.

And in this case, the county relies upon such grant.

Here, as the record shows, over 100 acres are claimed as alluvion, in front of survey No. 579, in other words, as much is claimed as alluvion, as was originally granted by the government.

Again, if the parties are entitled to the alluvion as being formed in front of the Coudaire survey No. 786, over 300 acres will go to the Wiggins Ferry Company. [See certificate of the county surveyor, Hilgard.] But, of course, no point is raised as to the alluvion, situate north of the Jarrot survey, No. 579, in this case.

(*i*) In the case of *Railroad v. Schurmeir*, 7 Wallace 273, the amount claimed as alluvion was 2.78 acres, and the land was but four feet lower than the land on the main body, and was not separated, at very low water, from it, and under these circumstances, this court adjudged the 2.78 acres to the riparian. Nor should it be forgotten that the plat of the United States surveyor, in that case, showed the river as a boundary.

But, in the case now before the court, as much is claimed as alluvion, as the government originally *donated*.

Again, Hilgard testifies, that a slough of running water always separates the main land from the alluvion.

Again, the grant, originally, was specifically for 100 acres, and no more, to Jarrot under Dumouchelle, if we consider this case with reference to survey 579, and, if, with reference to survey 786 (the Coudaire claim) to 400 acres, and no more, and the law required the survey in a particular manner.

So, also, in *Banks v. Ogden*, 2 Wal. 57, the lake was the boundary of the land in controversy, and the land claimed as alluvion was inconsiderable.

In *Jones v. Soulard*, 24 How. 141, the lands claimed by the city of St. Louis, by virtue of a grant of the state of Missouri, was adjudged to the public schools, under the previous grant of Congress to the schools of all the land, not, theretofore, granted to individuals, within the limits of the city, (and the limits, at the time of the grant, extended to the centre of the stream.) The subsequent grant of the state, of course, could not effect the grant of Congress, if the proprietary right to the soil of the Mississippi is conceded to be in the national government. Judge CATRON, in his opinion indicates, that the right of the riparian owner at St. Louis extended to the centre of the river. No reference, however, is made by him, to the acts of Congress bearing upon the subject.

It is evident, that in the case of *Railroad Company v. Schurmeir*, in 7 Wallace, this court modifies the opinion expressed in *Jones v. Soulard*, and that the whole subject is placed upon a broader and more philosophical basis, viz: That the Mississippi river is a navigable river, and that the

riparian owners on it have the same rights as the riparian owners on tide-water; that they are entitled to alluvion, just as the owners on tide-waters are entitled to alluvion; but it is not decided, that this right is an *absolute* right inherent in the property, but the matter stands as at common law, that is, the riparian has a qualified right, depending upon the action and subsequent grant of the sovereign. As against mere trespassers, and persons claiming without grant from the sovereign power, the right of alluvion of the riparian obtains, but, as against an express grant, the right of the riparian owner must give way.

In the *United States v. New Orleans*, 10 Peters 717, the United States failed, because by charter Louis XIV. had granted to the Western Company the land, coasts, harbors and islands in the Louisianas, and the Company had dedicated to New Orleans in 1724 and 1728 (one hundred years before the suit was instituted) on the maps of the town the river front as a *quay*.

The company owned the bed of the river, as well as the adjacent soil at the time of the dedication.

When the dedication was made, the civil law prevailed in that state, carrying the riparian proprietor to low-water mark, a doctrine not recognized by the common law.

Under the circumstances, since the United States purchased the Louisiana territory, subject to every grant made by the sovereigns of France prior to the purchase, and the premises sought to be recovered had been, by the king, granted to the company, and by the company dedicated to the city, the United States failed.

How could the United States recover the alluvion, where the river bed had expressly been granted to a corporation, and by that corporation dedicated to a city, as a landing for the purpose of commerce?

Then, too, the Mississippi at New Orleans is a tidal river and belongs to the State, (see Pollard's Lessee vs. Hagan, 3 Howard 212), and the claim of the sovereign to alluvion must be based upon an ownership of the bottom of the sea, or river. So the United had no title on that ground.

(*j*) In Illinois, in Middleton vs. Pritchard, 3 Scam. 510 and Ensminger vs. The People, 47 Illinois. 175-6, the statute of May 18, 1796, (2 Statutes at Large, p. 464), is wholly overlooked. and the decisions are based on the old common law decisions, which, as has already been stated, are not applicable to the states carved out of the Northwest territory.

(*k*) What is said in all the cases about the justice and propriety of the *jus alluvionis* is not at all controverted or denied in this case. It is a law eminently just and right in cases, where the grantee is bounded by a stream or the sea, and not by a mathematical line, and where the amount claimed as alluvion is inconsiderable, and for that reason the sovereign does not interpose. To say, that because in its munificence the government *donated* 100 acres to Jarrot under Dumouchelle, he can obtain 100 acres more as against another grantee of the government; or because Coudaire was the grantee of 400 acres, that he, therefore, can claim 400 acres more situate outside and west of the specific lines established by the United States survey, as against this grant to the county under the *jus alluvionis* would seem to be so unreasonable as to carry with it its own refutation. The right to alluvion

certainly is not unlimited. The case of King v. Yarborough, 3 B. & Cress. 91, cited by the Illinois Supreme Court, shows, that the courts will investigate and determine the reasonableness of the amount of land claimed as alluvion.

(*l*) It may, however, be objected that if the Mississippi is a navigable river, that the grant from the United States can not avail the county.

But the cases of Martin vs. Waddell, 16 Peters 369; Pollard's Lessee vs. Hagan et al., 3 How. 212, and other cases, decided by this court, in which it is held that the beds and shores of navigable waters belong to the States, can not be applicable to the Mississippi in the Northwest, because the proprietary right to the soil covered by the waters of the Mississippi river in the territory Northwest of the Ohio, at the time of the admission of Illinois into the Union was in the United States, and still remains so, unless the soil has been granted to the State or individuals.

It is only the bed and shores of such waters as are considered navigable, under the old common law rule, that cannot be affected by a grant of the United States.

But, although, by congressional legislation, the Mississippi river was declared to be navigable, and the riparian *proprietors bordering* on it have the same rights as those, who border on the navigable waters affected by the ebb and flow of the tide, the soil, nevertheless, remains the United States, unless granted.

(*m*) If it should be considered, that the land in controversy is not a grant of the domain of the state of Illinois, under the decisions of this court, already cited, the county ought to recover.

(1) By the act of 1859, as the court will remember, the county courts of the several counties were authorized to sell and dispose of "*all and any swamp or overflowed land* lying within the respective counties, including, also, all and every interest, claim, demand and gift granted to them by the state of Illinois, arising under the act of Congress passed Sept. 28, 1850, and acts amendatory thereof."

This grant, the county contends, includes lands derived by the state under the act of 1850, *as well as lands to which the state is entitled by virtue of its sovereignty.*

The government lands, of course, were lands included in the descriptive lists furnished to the state, but the state swamp lands, belonging to it, could not be so included, because not derived from the general government.

(2) But, it may be argued, that the act of 1859, only applies to the swamp lands derived from the United States under the act of 1850, and not to such swamp lands as may belong to the state, by virtue of the gradual formation of land adjacent to its shores, or of islands in its navigable waters.

A legislative construction, however, has been put upon the act of 1859, from which it must be apparent, that it was the intention of the state to grant the swamp land outside of the United States surveys, which could only under the circumstances be state swamp lands, because the act provides: "that nothing in the first section of the act to which this is an amendment (the act of 1859) contained shall authorize the county court of St. Clair county to sell, grant, convey, or dispose of any land or lands, lying outside of the lines of the United States survey situate in said county, but the county

court of said county is hereby authorized to lease all and any lands so situate."

This land is situate outside of the United States surveys, it is land subject to overflow, and is state swamp land (if the Mississippi is held to be a river, the soil of which belongs to the state, as decided in Pollard's Lessee's v. Hagan, 3 How.) and therefore belongs to the county under the acts mentioned.

II.

But the law donating 100 acres to the militiamen required a survey of the 100 acres.

So, also, the *donation* of 400 acres to Pierre Coudaire and his legal representatives required a survey.

It is a settled rule, that where no figure is calculated for in an entry, it is to be surveyed in a square, co-incident with the cardinal points, and large enough to contain the given quantity. [See Shipp vs. Miller, 2 Wheaton 316.] And in Massie vs Watts, 6 Cranch, 128, 165, this court holds, that in the location of entries of lands, when a given quantity of land is to be laid off on a given base, it is to be included within *four lines forming a square*, as nearly as may be.

Surveys 579 as well as Survey 786 are bounded *on every side by straight mathematical lines—and not by meandered lines*, OR THE RIVER.

(*a*) By reference to the field notes of Survey 579 the court will notice, that the United States Surveyor establishes the South-west corner of the survey at a *certain point in the*

river, and from the plat, which accompanies the Survey, it is further apparent, that the Survey is surrounded on all sides by clearly marked lines, and the river is not given as boundary on the plat.

This court will look to the plat to ascertain the intention of the Government. [Carmichael v. Trustees, 3 How. (Miss.) 84; Ferris v. Coover, 10 Cal. 589. Also Middleton v. Pritchard, 3 Scam. 510.] Lines marked on the plat are to be taken in connection with the survey and patent. [Davis v. Rainsford, 17 Mass. 207; Magoun v. Lapham, 21 Pick. 135; Blaney v. Rice, 20 Pick. 62.]

The grant and confirmation was a *militia donation* of 100 acres.

The law provided for a survey of that amount.

No more than that amount can be claimed under the act, for it cannot be contended with any show of reason, that when Congress confirmed and granted to Jean Dumouchelle 100 acres of land, which were to be surveyed, that because Jean Dumouchelle, or his assigns, located this claim near the Mississippi River, that Congress also confirmed one-half of the land covered by the Mississippi, at that time about 78 chains wide —that is, a tract extending 39 chains, almost a half a mile, farther west than where the western line of the Survey was established by the Rectors.

But the bed of the river cannot pass as incident or appurtenant to land in severalty, even where the land is bounded by the river, *usque ad filum aquae*, under the act of Congress of 1796, because as already stated, if the river is non-navigable, the bed of the stream will be held in common by

the opposite owners, and if the river is navigable, it is a public highway, dedicated as such to the public, and high-water mark, or the top of the bank, limits the grantee.

The bed of the river is land, and land cannot be appurtenant to land.

The donation of 100 acres to the heirs or assigns of Dumouchelle by Congress, cannot be invoked to defeat a further donation of land by Congress to St. Clair County, lying west of the western line of the 100 acres so donated, and not taking away one single acre, nor even the smallest fraction of an acre from the heirs and assigns of Jean Dumouchelle.

The grant of Congress to Dumouchelle was a limited grant.

It is an *ager limitatus*.

In the case of the Canal Appraisers v. The People (17 Wend. 599) Chancellor Walworth speaking of certain Military Bounty Lots, says:

"Where such lots are situated on the banks of rivers or streams, and run thence along the bank of such streams, this is a clear indication of the intention of the grantors, that the patent should not include any part of the *alveus* of the streams or of the islands therein. It is, therefore, a limited grant, within the meaning of that term as used by writers on the Civil Law, and it cannot be extended to the thread of the stream, or include any islands therein, even on the Common Law principle."

But Survey 579, is bounded by a straight mathematical line, clearly ascertained and fully established by the field notes and shown by the plats, as well as by the testimony of the surveyors.

Edward Rutz, formerly County Surveyor, says, that the land in controversy is opposite Survey 579, between it and the river.

Gustav Hilgard, the County Surveyor, testifies, that he ran the land out according to the United States field notes, and that the "tract sued for is west of Survey 579," and certifies to that fact.

The Illinois Supreme Court seems to overlook the fact, that in the plat accompanying this Jarrot Survey, a mathematical line is marked as the boundary, and it is assumed that, because the line was extended to *a point in the river*, the whole river was intended to be taken as the boundary. But it is contended, that the very fact, that the surveyor extended the line to a *point in the river* as to the Jarrot survey, shows that it was not the intention to give to the claimant any more than was embraced within certain limits, and as, indeed, the law of Congress required.

(*b*) The defendants in error, however, rely on survey 786, confirmed to the heirs and assigns of Pierre Coudaire.

By reference to the field notes of Survey 786 it will be found, that the line *extends to a post on the bank of the Mississippi river*, from which—thence N. 5 deg. E. up the Mississippi river and binding therewith (passing the south-westerly corner of Nicholas Jarrot's, Survey 579, claim 99, at 6 poles) 551 poles and 10 links to a post northwesterly corner of Nicolas Jarrot's Survey 766, claim 100, from which a sycamore. &c

The Report of Michael Jones, 2 American State Papers, p. 743, should also be read in connection with this survey. In this report it is stated, that Pierre Coudaire inhabited and cultivated a tract of land east of the Mississippi, fronting the town of St. Louis.

The plats introduced by the defendants in error on the trial below (correct copies of which it is assumed the court will find in the record) show a straight mathematical line from the southwesterly to northwesterly corner of this survey. The western line of survey 786 is identical with the western lines of survey 579, and the two other surveys north of 579. At any rate the field notes show, that the line passes the Southwesterly corner of survey 579, and that it runs to the Northwesterly corner of 766, this survey being the militia donation confirmed to Jarrot, as assignee, lying farthest north. The plat shows an identity of line. The total length of the western line, as noted by the surveyor, is the same as the total length of the western line of surveys 579, 624 and 766, with the addition of 6 poles, since Survey 786 starts 6 poles farther south than southern line of survey 579.

The Coudaire patent is subject to the Militia Claims 579, 624 and 766, and what is granted under it is found east of these militia claims and along Cahokia creek, or the River L'Abbe.

These are the facts as shown.

And yet it is argued, that the "plats and field notes to the Coudaire Survey show, beyond a doubt, that the middle of the river was intended to be the western boundary of his survey," and to enforce this, it is said, "he was entitled to 400 acres," and that "by the other surveys having been confirmed, located, platted and surveyed before his confirmation and survey, he lost 300 acres of his survey."

Let us examine this argument.

If the Coudaire claim goes to the middle of the river, then the other argument, that the Coudaire claimants lost 300 acres, is untrue, because from the south-west corner of his survey as shown by

the field notes to the centre of the river the distance is about a half a mile, and from there north to a point due west from the north-west corner of the survey (being also the north-west corner of survey 766) the distance is 156 chains, or nearly two miles. Over 500 acres would be embraced within this tract, and in addition to this, the unfortunate Coudaire claimants would hold the 100 acres along Cahokia Creek, to the east of the surveys 579, 624 and 766.

That the United States did not consider, that the Coudaire claim extended out so far, is shown by the fact that after the confirmation to Coudaire, and the survey of the claim the United State surveyed "Bloody Island," and sold it, although about one-half of this island, according to defendants argument was situate within these remarkable limits of the Coudaire confirmation.

That defendant's grantor, Wiggins, had no conception of the grandeur of the Coudaire donation as now set up, is shown by the fact that he purchased the island from the Government in 1825.

The statement, that Coudaire lost 300 acres of the survey, because claims 579, 624 and 766 had been previously located there, may be answered by the statement, *that doubtless these 300 acres were located on some other public lands.*

The assertion, however, that the Coudaire claim goes to the middle of the river, cannot be true:

1. Because the plat and survey, show that it was NOT *intended to be located in front* of surveys 579, 624 and 762, nor in fact intended to extend in any event farther than the bank of the river; and

2. Because while survey 579 extends to a *point in the river*, the Coudaire survey 786 extends only to a *post on the bank* and up

the Mississippi river and binding therewith, if we refer merely to the field notes, without looking to the plat and description recorded, where a different state of facts is shown, which will be noticed hereafter.

Yet the Illinois Supreme Court says, that "the Coudaire survey not only covers the Jarrot surveys, but extends beyond them. It not only takes any portion between the Jarrot surveys and Cahokia Creek, but the land, if any, between the western line and the river."

If this position be correct, does not the court virtually concede, that although a grant may front on or into (and in this case the Jarrot survey 579, fronts not on but into) the river, yet that the government may make another grant in front of it, so as to cover any fractions between the original grant and the river, and *future alluvion*, because it must be remembered that the Coudaire claim was granted subsequent to the Jarrot claim, under Dumouchelle.

But can it be said, that the Coudaire survey can take any thing in front of the Jarrot survey?

The evidence shows that at the time the Jarrot survey, No 579, was surveyed the western line of the survey ran to a point in the river. It is therefore evident, that no fractions existed to the west of the western line of this survey, and hence Coudaire could not take any fraction between the western line of the Jarrot survey and the river.

If no land was there to which alluvion could attach at the time of the survey, can it be said, that this alluvion belongs to the defendants in error by virtue of being the owners of the Coudaire claim.

Before the defendants in error can recover, they must show, that they are the owners of an estate to which the alluvion can attach—[Saulet vs. Shepard, 4 Wallace, 602.] It could not attach to the Jarrot survey, because that survey, No. 579, is bounded by a line, running into the river to a post, and it could not attach to the Coudaire survey, because at the time of the grant there was no land west of survey No. 579, to which the alluvion could attach.

On the contrary, it is manifest from the evidence, that while the Jarrot survey No. 579 runs out into the river, the Coudaire survey stops on the bank of the stream.

(c) But the expression in the Coudaire survey, "*up the Mississippi river, and binding therewith,*" upon which the Illinois Supreme Court seems to place so much stress, and upon which the defendants in error so confidently seem to rely to defeat this grant from the United States to the county, (utterly disregarding the other fact, that the west line of this survey is identical with the west line of surveys 579, 624 and 766, as is shown by the expression: "passing the southwesterly corner of Nicolas Jarrot's survey 579, claim 99, at 6 poles," 551 poles and 10 links, to a post northwesterly corner of Nicolas Jarrot's survey No. ——, claim 100, being the Jarrot survey situate farthest north) *is not even found in all the copies of the surveys of this Coudaire claim, introduced in evidence in this case.*

By reference to the printed record, this court will find what purports to be a true copy of the field-notes, signed by W. H. Lawton, styling himself "Custodian U. S. Surveys," (see page 18) and on the next page (p. 19) what purports to be a copy of the field-notes of the same survey, certified to by Frederick Mosberger,

styling himself "U. S. Recorder, L. T." In both these copies the expression "*up the Mississippi river and binding therewith*" occurs, and the only difference in the notes is: that in Lawton's copy, the notes say: "*thence N 85 degrees, W 174 to a post on the bank of the Mississippi river;* while in Mosberger's copy the notes say: "*to a point on the bank.*"

If, however, the court will turn to pages 20, 21 and 22 of the record, it will find, in what purports to be a copy of the plat and description of the Coudaire survey No. 786, executed in January 1815, by the Messrs. Rector, surveyors of private claims in the district of Kaskaskia, and which plat and description is recorded in the "Records of Private Surveys in Illinois," in the custody of the United States recorder of land titles in St Louis, on pages 335-6, of said record, *that the expression, "up the Mississippi river and binding therewith,"* DOES NOT OCCUR *in said survey.* The western line of the Coudaire survey is described in said record as follows: (see p. 22) TO A POST on the LEFT *bank* of the Mississippi river, CORNER OE THIS SURVEY, thence *up* and *along* the *bank* of the Mississippi river, N. 13 25 E., (N 5 E) at 1.50, a point the southwest corner Survey *579*, a corner of the Cahokia common survey 759, from which a sycamore, 20 inches in diameter, bears S 70, 35 E., (S. 85 E.,) 2.50 chains distant; at 137.85 chains, a post in the northwest corner of survey No. 766, AND A CORNER TO THIS SURVEY, &c."

It is contended by the plaintiff in error, that this plat and description of this survey, recorded in the "Records of Private Surveys in Illinois," controls in this case, and that, if it is apparent from the plat and description so recorded, that the western line was limited to the bank of the river, or that the

surveyors established *specific corners on* the *bank* of the river as the corners of the survey, as was done in this case, or that the line established as the western line of survey 579 was adopted as the western line of survey 786, that this court ought not to carry the line of the survey beyond these corners, so as to embrace other land not included within the original lines.

It will also be noticed, that both copies of the field-notes are imperfect, and contain omissions. On the other hand, the copy from the record is full and perfect, and evidently contains the completed work; and upon this plat and description, as recorded, the patent was issued by the United States to the legal representatives of Pierre Coudaire, and not upon the fragmentary field-notes. It would seem, that the plat and description of the survey, as recorded, should control the western limits of the claim in case of doubt. At any rate, under such circumstances, the jury was justified in finding, that the premises in controversy were situate west of the western line of the Coudaire survey, and their verdict ought not to have been disturbed.

(*d*) Let us suppose, that the appellants are not bounded by a line, but on the Mississippi, under the Coudaire survey, what will be their position then?

Putting out of question the 9th section of the act 1796, already fully discussed and the plat, which shows a straight line as the western boundary of the survey, we maintain, that the words to a post on the bank of the river, which——from thence N. 5 degrees E up the Mississppi river and binding therewith, do not extend the right of the defendants in error to the centre of the river, in this case.

It was the manifest intention to bound the claim by the bank of the river.

In *Howard vs. Ingersoll*, 13 How 381, 416, this court decides, that the words "along the bank" are strong and definite enough to exclude the idea, that any part of the river or its bed was granted in the navigable and unnavigable parts of the river.

[See, also, Alabama v. Georgia, 23 How. 505.]

In *Hatch v. Dwight*, 17 Mass. R. 298, the court held, that where land is *bounded by the bank of a stream*, it necessarily excludes the stream itself.

In *Child v. Starr*, 4 Hill 375, it is said, that in running to a monument standing on the bank, and from thence running *by the river*, or *along the river*, &c., does not restrict the grant to the bank of the stream; for the monuments in such cases are only referred to as giving the directions of the lines to the river, and not as restricting the boundary *on the river*. If the grantor, however, after giving the line to the river bounds his land by the bank of the river, or describes the line as running *along the bank* of the river, or bounds it upon *the margin* of the river, he shows that he does not consider the whole *alveus* of the stream a mere mathematical line so as to carry his grant to the middle of the river.

In the same case in 5 Denio 599, where the whole original deed conveying 20,100 acres of land on the west side of Gennessee river, bounding it easterly on the bank of the river agreeable to the traverse, came in question, it was held, that

the tract was bounded by the bank of the river and not at the thread of the stream.

And so in another case in that state, *Kingman v. Sparrow*, 12 Barb 203, where the patent from the state described the premises as: "thence westerly *to the waters* of the said outlet, and thence along the same to the place of beginning," it was held, that the intention was to stop at the edge, or margin of the river.

In *Bradford v. Cressey*, 45 Maine 9, where the line was on the west bank of said creek, the court held, that where a party uses the term " bank, side, margin, or shore," they become themselves monuments, and are to be so treated.

In *Martin v. Vance*, 3 Head 649, it was held, that although the grant calls for a corner on the bank, above low-water mark, the grantee will go to the centre of the stream, *unless it is shown that a line was run and marked on the bank as the true boundary.*

In *Sanders v. McCracken*, Hardin 59, it was held, that a deed calling to run " to a creek, and down the creek *with the meanders*, BINDING THEREWITH," conveys *no right* to the *channel, or the bed* of the creek.

And in *Yoder vs. Scoope*. 3 Bibb 205, where a deed described the land as " *binding on B.'s Creek*, containing 150 acres, more or less," and one of the corners was an island in the creek, " *running thence to the beginning*," it was held, that the line from the corner of the island should be run *direct* to the beginning, and not with the meanders of the creek.

And in *Orendorff* v. *Steele*, 2 Barb. Sup. Ct. 128, where the description was "thence north 32 deg. to the river and thence down along the said river," the court held, that the description would undoubtedly in *the absence* of any circumstance *to control the construction of the grant* and *to show* the actual intention of the parties to be otherwise, carry the northern line of the lot to the middle of the river. "But," says the Judge, "it appears on the face of the patent, that the colonial governor, in issuing this patent, pursuant to his instructions, acted under the directions of the council, which allowed only 100 acres to be patented to each German emigrant, to be allotted and granted in severalty. * * * We are to look to the whole patent to enable us to give a just interpretation to any part of it; and we cannot but see that it was the leading object and intent of the parties to convey to each patentee 100 acres, and no more."

In surveying the

Nor must it be forgotten that the law under which Coudaire Claim, the surveyor, as shown by the field notes, ran "to a post on the bank." The word "to" is a word of exclusion. Bradley v. Rice, 1 Shep. 198. Not only that, but it is also shown that the line was run on the margin of the Mississippi, and binding therewith 551 poles and 10 links N. 5 degrees east—a straight line.

Nor must it be forgotten, that the law under which Coudaire and his assigns claim, required a survey. And where by the tenor of a legislative grant it is required that an actual survey should be made, so that the land granted may be designated upon the earth and separated from the ungranted land, and that the survey and plat shall be returned and accepted by the grantors before the title should pass to the grantee, and the survey is made, and the plat returned and accepted, the extent of the grant is to be

determined by the actual location upon the earth. Machias v, Whitney, 4 Shep. 343.

If, however, "*the bank*" is the limit of the Coudaire Survey, rather than the post established and the surveyed courses and distances, then the western limit of the tract should be the bank of the river, as it was when the dyke was built by St. Louis.

And even if the Coudaire claim should be carried to low-water mark, it would not carry the appellant beyond the slough—the old river bed on the west before the building of the dyke—because, as Hilgard says, there is always running water in the slough.

Again it is suggested, that if Coudaire was at the time of the grant riparian owner of the smallest fraction of land west of Survey 579, that since it is shown that the bank washed in, so as to encroach upon Survey 579, that the title to the land in controversy must be determined by the boundary as established by United States Surveyors on the west for Survey 579.

The attention of this court is, however, called to the case of Bates vs. Illinois Central R. R. Co., 1 Black 204, where this court holds, that in an action of ejectment for land bounded by a river, which has changed its bed and formed a new channel since the date of the survey, it is proper for the jury to find whether the land in controversy is within the tract surveyed and granted; that the jury are bound to find the river boundary to be where the plat and survey and the field notes have designated it, though in fact the river had at the time of the survey another channel; and that the public, by the act of the proper officer had the right to fix and declare the place of the river for the purposes of a survey and sale

of the lands; and that a purchaser cannot contradict the survey, and claim beyond it, by showing that the true channel of the river was really at another place.

An application of the principles laid down in this case, and the case of Machias vs. Whitney, to the case at bar, will give defendants in error all the United States confirmed to them, while the county will recover what has been granted to it.

(*e*) But let us leave out of question the lines and the ninth section of the act of 1796, and assume that the Surveyors in direct violation of law, bounded the Coudaire Survey along or on the river.

How would the case then stand?

By the common law, the riparian proprietor is *prima facie*, only the owner of the *alveus*, or bed of the river adjoining his land, to the middle of the stream. [Starr v. Child, 4 Hill 273.]

It is a mere legal presumption, which carries the riparian owner *ad medium filum aquae.*

This presumption, however, in this case, is overcome under the act of the Illinois legislature providing, "that in all judicial proceedings the certificate of the county surveyor of St. Clair county, that the lands in controversy are outside of the lines of the United States survey, shall be *prima facie* evidence that the county is entitled to the possession of the same."

The certificate of the county surveyor showing, that the land is situate outside of the United States surveys, *prima facie* makes out the case for the plaintiff in error.

It is a presumption created by statute.

It shifts the burden of proof upon the defendants.

The title of the defendants is a mere presumptive title.

Against tresspassers it may be good.

But this presumptive title is met by another presumptive title.

Not only that, it is overcome by an express grant of the general government.

Not only that, but the premises are also granted by the state.

(*f*) Another point should not be overlooked while the court investigates this branch of the case.

The grants to the heirs and assigns of Coudaire, as well as Dumouchelle, were donations.

Under the common law in all questions arising under grants, the construction, if doubtful, is always to be in favor of the government, and against the grantee. [2 Washb. on Real Property, 538, 2d Edition.]

This rule, it is true, in so far as it regards land purchased for a valuable consideration from the government, does not obtain in this country. No, authority, however, has been found overturning the old rule of construction as to donative grants.

A grant from the government is most strongly construed against the grantee, and whenever there is a doubt, it enures to the benefit of the government. [Mills et al, v. St. Clair Co., 2 Gilm. 227.]

(*g*) And, finally, the Plaintiff in Error refers to the two plats of this Coudaire survey No. 786 in this record. In both plats it will be perceived, that a LINE *is marked as the western* boundary of the survey, and a line which is identical not only with the western boundary of Survey 579, but also with the western line of the two other Militia claims situate north of this Survey. It is true, that while a line is clearly marked, it is also apparent that the Mississippi river is immediately west of the line. But this fact, does not change the FACT THAT THE LINE and NOT THE RIVER *was marked on* the plat as the western boundary.

~~LOUIS HOUCK~~, R. A. Hatcher

Counsel for Plaintiff in Error.